Supreme Court, U.S.
FILED
AUG 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-343

No. 87—

In The
Supreme Court of the United States
October Term, 1987

STATE OF MONTANA; JOHN D. LaFAVER, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; TREASURE COUNTY, Montana, YELLOWSTONE COUNTY, Montana; LORRAINE HAMILTON, Treasurer, Big Horn County, Montana; KATHLEEN THOMAS, Treasurer, Treasure County, Montana; and MAY JENKINS, Treasurer, Yellowstone County, Montana,

Appellants,

vs.

CROW TRIBE OF INDIANS; UNITED STATES OF AMERICA; and WESTMORELAND RESOURCES, INC.,

Appellees.

ON APPEAL FROM THE NINTH CIRCUIT COURT OF APPEALS

JURISDICTIONAL STATEMENT

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35 pp

QUESTIONS PRESENTED

1. Is application of the Montana gross proceeds tax and the Montana coal severance tax preempted by federal law as to a non-Indian producer engaged in the mining of tribally-owned coal underlying lands outside the exterior boundaries of the Crow Indian Reservation?

2. Does a justiciable or ripe controversy appropriate for declaratory judgment relief exist concerning whether application of the Montana gross proceeds tax and the Montana coal severance tax to the mining of coal within the exterior boundaries of the Crow Indian Reservation is preempted by federal law? If so, is the present record sufficiently developed to make the required determination?

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The court of appeals' opinion is reported at 819 F.2d 895, and is reproduced in the appendix at 1a-21a. The district court's findings of fact and conclusions of law are not officially reported and are reproduced at 22a-74a. An earlier court of appeals' decision, *Crow Tribe v. Montana,* 650 F.2d 1104 (9th Cir. 1981), *amended,* 665 F.2d 1390, *cert. denied,* 459 U.S. 916 (1982), is reproduced at 79a-106a.

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JURISDICTION

This is an appeal from an opinion and judgment of the Ninth Circuit Court of Appeals entered June 11, 1987, holding preempted by federal law the application of the Montana coal gross proceeds tax, Mont. Code Ann. § 15-23-701 to 704 (1985), and the Montana coal severance tax, Mont. Code Ann. §§ 15-35-101 to 205 (1985), to an area outside the exterior boundaries of the Crow Indian Reservation, known as the ceded strip, and to the reservation itself. Jurisdiction below was predicated on 28 U.S.C. §§ 1331, 1343, 1345, and 1362. A notice of appeal with respect to the court of appeals' opinion and judgment was filed on July 24, 1987, with that court and is reproduced in the appendix at 107a-109a. Appellate jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2).

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

A. The relevant federal constitutional provision is Article VI, clause 2, reproduced in the appendix at 135a.

The relevant federal statutes and regulatory provisions are reproduced in the appendix as noted:

The Act of April 27, 1904, 33 Stat. 352 (App. 136a-157a)

The Act of February 17, 1917, 39 Stat. 944 (*codified in* 30 U.S.C. §§ 86 to 89) (App. 158a-160a)

The Act of June 4, 1920, §§ 1 and 6, 41 Stat. 751 (App. 161a-163a)

The Act of May 19, 1926, 44 Stat. 566 (App. 164a)

The Act of May 26, 1926, §§ 1 and 6, 44 Stat. 658 (App. 165a-168a)

The Act of May 2, 1928, 45 Stat. 482 (App. 169a)

The Act of August 31, 1937, 50 Stat. 884 (App. at 170a-171a)

The Act of May 11, 1938, 52 Stat. 347 (*codified as amended in* 25 U.S.C. §§ 396a to 396g) (App. 172a-175a)

The Act of May 19, 1958, 72 Stat. 121 (App. 176a-177a)

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The Act of May 17, 1968, 82 Stat. 123 (App. 183a)

Portions of Title 25, part 211 of the 1987 Code of Federal Regulations (App. 184a-204a).

B. The relevant state constitutional provision is Mont. Const. Art. IX, § 5, reproduced in the appendix at 205a. The relevant state statutes are the Montana coal gross proceeds tax, Mont. Code Ann. §§ 15-23-701 to 704 (1985), reproduced at 206a-207a, and the Montana coal severance tax, Mont. Code Ann. §§ 15-35-101 to 205 (1985), reproduced at 208a-226a.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Crow Tribe of Indians instituted the action below in 1978. The complaint, as finally amended, contained various claims generally contending that the Montana coal gross proceeds tax, Mont. Code Ann. §§ 15-23-701 to 704 (1985), and the Montana coal severance tax, Mont. Code Ann. §§ 15-35-101 to 205 (1985), are preempted by federal law with respect to production of coal beneficially owned by the Tribe in an area outside its reservation's boundaries known as the "ceded strip" and within the reservation's exterior boundaries. (App. 110a-125a.) Several months after the initial complaint was filed, appellee Westmoreland Resources, Inc. intervened as a party-defendant. Westmoreland is a Delaware corporation which mines tribally-owned coal on the ceded strip and has paid all of the gross proceeds and severance taxes at issue here. The Tribe's second amended complaint was dismissed by the district court in 1979 for failure to state a claim upon which relief could be granted; however, that determination was reversed and the matter remanded for trial in *Crow Tribe v. Montana*, 650 F.2d 1104 (9th Cir. 1981), *amended*, 665 F.2d 1390, *cert. denied*, 459 U.S. 916 (1982) (*Crow I*). After remand, appellee United States intervened as a party-plaintiff.

A 12-day, nonjury trial occurred during early 1984, and in September 1985 the district court entered extensive findings of fact, conclusions of law, and a judgment (App. 77a-78a) in favor of the appellants[1] and dismissing the

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[1]The appellants include the State of Montana, the Director of the Montana Department of Revenue, three counties—Big Horn, Treasure, and Yellowstone—and those counties' treasurers. The individual appellants were sued only in their official capacities. Unless otherwise textually required, the appellants will be referred to collectively as Montana.

preemption claims. The Tribe and United States appealed, and the court of appeals reversed the district court's judgment in its entirety on June 11, 1987.

II. RELEVANT FACTS

A. Reservation and Ceded-Strip History

The Crow Indian Reservation was initially created under the 1851 Treaty of Fort Laramie, 2 C. Kappler, *Indian Affairs, Laws, and Treaties* 594 (1904). The 1868 Treaty of Fort Laramie, 15 Stat. 649, and three later cession laws, 22 Stat. 157 (1882), 26 Stat. 1039 (1891), and 33 Stat. 352 (1904), reduced the reservation to its present boundaries.[2] The third of those statutes, the 1904 Act, severed from the reservation an area commonly known as the ceded strip, which consists of approximately 1.1 million acres and lies immediately north of the present reservation. *Little Light v. Crist,* 649 F.2d 683, 685 (9th Cir. 1981) (*per curiam*). Substantial homesteading activity occurred on the ceded strip pursuant to several presidential proclamations, and, at the time of trial, 93.9 per cent of the surface acreage was owned in fee by non-Indians, 3.8 percent was owned by Montana, 1.5 percent had been allotted to tribal members,[3] and .8 percent was held in trust for the Tribe. As of 1980, 99 percent of ceded strip residents were non-Indian. Through the Act of May 19, 1958, 72 Stat. 121 (1958 Act), 10,260.95 acres

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[2]Although not modifying the exterior boundaries of the reservation, the Act of August 31, 1937, 50 Stat. 884, later excluded the city of Hardin from it.

[3]Articles III and IX, section 4 of the 1904 Act, 33 Stat. 358-59, preserved the allotment status of any ceded-strip lands which had previously been allotted and further provided an opportunity to members residing within the strip to receive allotments of land then occupied by them. Later statutes provided for additional allotment of ceded-strip property. *See* Act of May 19, 1926, 44 Stat. 566; and Act of May 2, 1928, 45 Stat. 482.

of vacant and undisposed-of land ceded pursuant to the 1904 Act were restored to tribal ownership. The restored acreage constituted the only surface property within the ceded strip not patented, allotted, or otherwise conveyed by the United States prior to passage of the 1958 Act. Section 2 of the 1958 Act provided that these lands would be held in trust by the United States and that they were "hereby added to and made a part of the existing reservation[ ]."

The ceded strip contains portions of three Montana counties—Big Horn, Treasure, and Yellowstone—and various other state political subdivisions which provide a full range of governmental services. Neither presently nor at any time since the 1904 Act has the Tribe exercised governmental control over the ceded strip.

B. Ceded-Strip and Reservation Coal Mining

The sole coal production currently taking place on the ceded strip is at Westmoreland's Absaloka mine. Westmoreland and the Tribe first entered into a lease for coal production in 1972, which was superseded by another in 1974. The lease has been amended several times and now applies only to a ceded-strip area denominated as Tract III. None of the surface lands in Tract III was restored to beneficial tribal ownership under the 1958 Act, and title to virtually all such lands has been acquired by Westmoreland. The 1974 lease provided to the Tribe royalties among the highest, if not the highest, of those then received by any Indian tribe within the United States, and through October 1983 Westmoreland had paid $17.8 million in royalties to the Tribe.

Actual operation of the Absaloka facility has been contracted by Westmoreland to another non-Indian company. Westmoreland's and its contractor's mining activities at the facility are subject to comprehensive regulation under state and federal statutes. Westmoreland,

as an example, received its first permit from the Montana Department of State Lands under the Montana Strip and Underground Mine Reclamation Act, Mont. Code Ann. §§ 82-4-201 to 254 (1985), to begin mining operations in 1974 and subsequently received 15 other new or amended permits. After enactment of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 to 1328, Montana's state reclamation plan was submitted and approved under 30 U.S.C. § 1235, and pursuant to that plan the Department of State Lands regulated the Absaloka facility.[4] Other state agencies, such as the Department of Health and Environmental Sciences, the Department of Natural Resources and Conservation, and the Department of Labor and Industry, additionally regulate the mine's activities, while Westmoreland and the mine's employees directly benefit from local government infrastructure and related services. The Tribe has exercised no regulatory control over the facility.

No on-reservation coal production by any producer has occurred, and no lease contemplating such production exists. In 1972 Shell Oil Company and the Tribe did negotiate a coal-production lease covering approximately 30,000 acres in the southern part of the reservation. The Tribe filed a lawsuit in 1974 against Shell and the Secre-

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[4]Subsequent to trial, the Department of the Interior promulgated regulations under which it deemed the beneficial ownership interest by a tribe in any coal, including that underlying non-Indian-owned lands on the ceded strip, to be "Indian lands" as defined in 30 U.S.C. § 1291(9). 49 Fed. Reg. 38462 (Sept. 28, 1984). The Office of Surface Mining Reclamation and Enforcement was given exclusive regulatory authority over such Indian lands. *Id.* at 38478. Montana filed suit challenging this aspect of the regulations, and the action was eventually dismissed by stipulation on the basis of a Memorandum of Understanding between the State and the Department of the Interior. (App. 259a-270a.) The memorandum provides, in relevant part, that the more stringent of state or federal program standards will be applied to ceded-strip mining activities and that the Department of State Lands has lead enforcement responsibilities.

tary of the Interior to void that agreement, but later negotiations led to a new lease in 1980. Secretarial approval of the 1980 lease, however, was delayed until 1983. The 1980 lease provided for primary coal development in an area known as Young's Creek, consisting of approximately 2560 acres and located near the Montana-Wyoming border. Shell surrendered its rights under the lease in December 1985 without beginning actual construction of a mine.

C. The State Taxes

As enacted in 1975 and presently codified, the Montana coal severance tax, Mont. Code Ann. §§ 15-35-101 to 205 (1985), contains a tax rate schedule based on heating quality and type of mining operation, with a tax rate of 30 percent of "value" imposed on surface mining of coal having a per-pound BTU rating equal to or above 7,000. § 15-35-103(1). The term "value" means the "contract sales price" which is defined in section 15-35-102(5) as the FOB mine price minus various deductions. The tax is due quarterly, and among the deductions allowed for quarterly production periods ending on or after September 15, 1984, are specified amounts of royalties owed to Montana, the United States, and any federally recognized Indian Tribe. §§ 15-35-102(5)(a)-(d), 15-35-104.[5] West-

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[5]The Montana Legislature enacted several amendments since the district court trial which are relevant to the severance tax's rate. First, under 1985 Montana Laws, chapter 636 (*codified in* Mont. Code Ann. §§ 15-35-201 to 205 (1985)), it provided a tax credit of 33 1/3 percent for any incremental coal production produced and sold during calendar years 1985 and 1986. 1987 Montana Laws, chapter 608, section 5, extended the production incentive tax credit provisions to additional periods and, for incremental coal production sold between January 1987 and June 1990, increased the rate of the tax credit. (App. 227a-240a.) Section 3 of the 1987 session law also provided that, should the

(Continued on following page)

moreland paid Montana $53.8 million in severance taxes through 1982 as to ceded-strip production and thereafter deposited its quarterly payments into the district court's registry pursuant to a preliminary injunction entered in January 1983; with accrued interest, the escrowed funds now total approximately $26 million. The Tribe has no responsibility for paying severance taxes with respect to Absaloka production and has paid none.

Section 15-35-108 directs disposition of the severance tax proceeds into particular state funds or accounts. At the time of trial, 50 percent of the proceeds was placed into a coal severance tax trust fund established under Art. IX, section 5 of the Montana Constitution to address the environmental and socioeconomic impact of large-scale coal mining and six percent into a highway construction trust fund account. The remainder was distributed to various funds or uses including the local impact and education trust fund account, public school equalization aid, and a nonexpendable trust fund utilized for parks acquisition or management and other aesthetic or cultural purposes.[6]

(Continued from previous page)

Montana Department of Revenue determine coal produced in the state between July 1, 1987, and June 30, 1988, exceeds 32.2 million tons, the tax rate for coal of the BTU quality by Westmoreland on the ceded strip will be reduced to 25 percent for coal produced between July 1, 1988, and June 30, 1990, to 20 percent for coal produced between July 1, 1990, and June 30, 1991, and to 15 percent for coal produced after June 30, 1991. (App. 234a-235a.) However, even if the 32.2 million ton production amount is not exceeded, the percentage tax rates for coal with a heating quality of 7,000 or more BTUs per pound will be reduced under the new law to 25 percent for fiscal year 1990 and to 20 percent for fiscal year 1991 and thereafter. (App. 232a-233a.)

[6]Section 15-35-108 has been modified since trial, but, as presently codified, the general allocation scheme remains comparable. See 1987 Mont. Laws, ch. 662, § 1 (App. 241a-243a).

The coal gross proceeds tax, Mont. Code Ann. §§ 15-23-701 to 704 (1985), is imposed annually by the county in which the particular mining activity occurs. § 15-23-702. The producer is required to report the dollar amount of its gross yield or value, calculated in the same manner as the "contract sales price" under section 15-35-102(5), and the tax is determined by the application of the county property tax mill levy against the assessed value. §§ 15-23-701, -702, -704. The mill levy will vary by county and is adjusted each fiscal year. All Westmoreland ceded-strip production has taken place in Big Horn County. Westmoreland had paid approximately $8.1 million in gross proceeds taxes as of December 31, 1982. As with severance taxes, the Tribe has no responsibility for payment of gross proceeds taxes.

III. DISTRICT COURT AND APPELLATE DECISIONS

The district court entered lengthy findings of fact and conclusions of law. It first found that Westmoreland's coal production will have various environmental and socioeconomic consequences, some of which are not presently known and cannot be definitively measured. (App. 42a-43a.) The court further observed that coal mining is often associated with a boom-and-bust cycle, alternately creating substantial, new demands for governmental services and then eradicating the economic base upon which revenue to support those services is predicated. (App. 42a, 50a-53a.) The severance tax rate, according to the findings, derived from the "best estimate of the short and long-term costs to the state from coal mining" and, together with the coal gross proceeds tax, was "designed to promote orderly development which would protect the environment and the interests of Montanans and to make coal development pay its fair share." (App. 52a.) The court further stated that the severance tax was intended not "to

capture the maximum economic rents or excessive profits'' but (1) ''to provide front end financing to communities and agencies faced with rapid increases in demands for various services;'' (2) ''to remedy problems created by jurisdictional mismatches;'' and, significantly, (3) ''to respond to problems, both foreseen and unforeseen, that will arise when coal mining operations cease.'' (App. 52a-53a.)

Second, the district court carefully reviewed divergent expert testimony concerning the impact of the challenged taxes on the marketability of ceded-strip coal. It concluded that coal-sourcing decisions by large buyers, such as the utilities which purchase virtually all of Westmoreland's Absaloka production, are affected by economic and noneconomic factors such as (1) the delivered, and not simply the FOB mine, price of coal; (2) the physical and chemical composition of coal insofar as it affects suitability for use in certain boilers or under specific pollution-control requirements; and (3) production reliability. (App. 56a-58a.) The largest component of delivered cost is ordinarily the expense of transportation which the court found is ''the major factor in determining the logical marketing area for a mine's production.'' (App. 57a.)

In its conclusions of law, the district court rejected Montana's position that the 1958 Act did not restore to the Tribe beneficial ownership of coal interests except, arguably, those interests underlying restored surface acreage. It instead reasoned, largely on the basis of legislative history, that the Act restored to trust status not only reserved mineral interests underlying the vacant and undisposed-of surface lands referred to in the statute but also reserved mineral interests underlying surface areas not subject to restoration. (App. 61a-62a.) The court, nonetheless, concluded that these mineral interests were not returned to ''reservation'' status under section 2 of the Act, stating that such status ''has little significance in describing a tribally-owned mineral estate which lies out-

side the surface boundaries of a tribe's reservation[.]" (App. 63a.) It further found no support in the legislative history "for the anomalous proposition that Congress extended governmental powers and attributes of a tribe's inherent sovereignty to the subsurface estate in an area outside the boundaries of a diminished reservation where the surface is held predominately by non-Indians." (*Ibid.*)

Applying the preemption principles traced in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), as directed by the court of appeals in *Crow I*, the district court determined applications of the gross proceeds and severance taxes to ceded-strip mining activity was not preempted. The court reasoned that the trial evidence did not establish any adverse effect from the taxes on the Tribe's control over leasing its mineral interests or on the development of those interests and that the taxes were justified by Montana's governmental responsibilities within the ceded strip even if tribal economic development had been somewhat adversely affected. (App. 67a.) It found no impermissible infringement on tribal sovereignty by the taxes as to ceded-strip production since, most importantly, the Tribe has no sovereign, or governmental, responsibility for the ceded strip and its royalty interest in the coal was neither legally different from that of any other lessor nor impaired by the taxes. (App. 70a-71a.)

The district court, finally, found that no justiciable controversy warranting declaratory relief existed with respect to application to the gross proceeds and severance taxes to coal production on the reservation. It noted the absence of any coal development within the exterior boundaries of the reservation, the possibility that production might not occur under the Shell agreement because of a depressed coal market, and the lack of evidentiary detail concerning the effect of such mining activity. (App. 60a.)

In reversing, the court of appeals first stated that the district court's ceded-strip preemption analysis was ex-

clusively based on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and the notion that, because Westmoreland's production has taken place outside the reservation, state taxation was permissible in the absence of a contrary congressional enactment. (App. 6a-7a.)[7] It then said that, because one of the policies underlying the Indian Mineral Leasing Act of 1938, 52 Stat. 347 (*codified as amended in* 25 U.S.C. §§ 396a to 396g) (1938 Act), was "to insure that Indians received 'the greatest return from their property'" (App. 8a-9a), unrebutted evidence establishing that the gross proceeds and severance taxes had "at least some negative impact on the coal's marketability" (App. 12a) would compel preemption unless justified by legitimate state interests. Rejecting the district court's contrary findings, the court gleaned such negative impact from the greater post-1975 increase of Wyoming-based coal production and its related conclusion that "the taxes imposed are the components that differ most clearly between [the two states]." (App. 12a.)[8] The court rejected as insuf-

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[7]The court of appeals erred in this reading of the district court's decision. As developed above, the district court applied the *White Mountain* interest-balancing standard as required by *Crow I*, expressly refusing to adopt Montana's argument that *Jones* controlled resolution of the ceded-strip preemption question. (App. 64a-65a.)

[8]In determining that the gross proceeds and severance taxes were responsible for the difference in the rate of coal production growth from Montana and Wyoming mines, the court of appeals relied on a marketability analysis offered by the Tribe and United States. Through its expert testimony, Montana criticized the Tribe and United States' approach as grounded on a highly unrealistic economic model which failed to consider adequately either the difference in the traditional markets for Montana and Wyoming coal or the myriad factors influencing a utility's determination to use certain coal. The district court credited Montana's analysis on the marketability question. (App. 56a-59a.) The court of appeals' redetermination of these facts was in clear disregard of Fed. R. Civ. P. 52(a) and evidenced its general pattern of ignoring the trial court's findings.

ficient Montana's claimed interests, which it restrictively identified as raising revenue to offset the costs of additional governmental services required by Westmoreland's activities and "of treating the pollution and solid waste disposal that attend coal production." (App. 13a.) It stated, again relying on the Tribe and United States' expert testimony and discounting the findings below, that the governmental expense associated with coal-related population growth was more than met through other revenue generated by the mining activity and that the unquantifiable cost attendant to possible, adverse environmental effects from coal production was adequately addressed through existing federal and state regulation. (App. 15a-16a.)

The court of appeals next held the gross proceeds and severance taxes infringed upon the Tribe's sovereignty and were, therefore, preempted without reference to the 1938 Act. The court found that the taxes were levied against mineral resources, which it deemed "'a component of the reservation land itself,'" and, yet again ignoring the district court's findings, that tribal self-government and development were frustrated by the taxes.

Lastly, the court of appeals rejected the district court's determination that no justiciable controversy existed warranting declaratory relief with respect to the on-reservation coal production, observing that the challenged taxes are in place and concluding, without any evidentiary support in the trial record, that "[b]ecause of the taxes, the [non-Indian] lessee cannot find a buyer, making it difficult for Crow to find a lessee." (App. 20a.) The court then summarily proceeded to the merits of this issue and held the taxes preempted for those reasons discussed in connection with the ceded strip.

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THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. The Validity Of The Gross Proceeds And Severance Taxes As To Ceded-Strip Production Is A Matter Of Significant Importance To The Parties And Presents A Substantial Federal Question.

The policy and practical importance of the ceded-strip preemption issue is undisputed. Montana's authority to impose its severance and gross proceeds taxes on Westmoreland, or a similarly-situated coal development lessee, raises a fundamental jurisdictional question concerning a state's right to enforce otherwise nondiscriminatory and valid taxing statutes against a non-Indian producer which is engaged in mining a tribally-owned mineral resource outside the boundaries of a reservation. When the producer enjoys the full range of state and local government services and is not subject to regulation by a tribe in its governmental capacity, the question becomes even more compelling. This issue has never been addressed by the Court, and the court of appeals' decision strikes at the very heart of state sovereignty. Moreover, aside from the profound jurisdictional question, the amount in controversy—$100 million—underscores its practical importance.[9]

There is also no dispute the ceded-strip preemption issue presents a purely federal question. Its resolution

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[9]As stated above, the district court-established escrow fund now contains approximately $26 million in severance tax payments and accrued interest. Although such amount is itself obviously significant, prior tax payments are at issue both through a cross-claim filed by Westmoreland seeking refund of all gross proceeds and severance taxes paid by it prior to October 1982 and through a constructive trust claim by the Tribe as to pre-1983 nonescrowed payments. With respect to the latter claim, the Tribe submitted trial exhibits placing the amount sought as high as $78.8 million. Future tax revenues from Westmoreland production will, of course, also be substantial.

thus requires deciding subsidiary matters such as (1) the effect of the 1958 Act on the mineral interests underlying, *inter alia*, Tract III of the ceded strip, (2) whether, if these interests have been returned to "reservation" status under the 1958 Act, such status has controlling significance in determining applicable preemption standards, (3) the preemptive scope of the 1938 Act under the facts here, and (4) the nature of the Tribe's sovereignty interest with respect to ceded-strip production. These subsidiary issues must be answered exclusively with reference to federally developed principles. *See, e.g., National Farmers Union Insurance Companies v. Crow Tribe*, 471 U.S. 845, 852-53 (1985); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

A. Preemption by Federal Statute

The Court's previous Indian law decisions have recognized an analytical dichotomy as to a state's on- and off-reservation taxing authority. *Compare Mescalero Apache Tribe v. Jones*, 411 U.S. at 147-49, *with White Mountain Apache Tribe v. Bracker*, 448 U.S. at 141-45, *and Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 837-39 (1982).[10] While, on the face of the

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[10]*Jones* arose from a challenge to gross proceeds and use taxes imposed upon a tribally-owned ski resort. The resort was located outside the exterior boundaries of the tribe's reservation on national forest lands, but the land on which it was situated was deemed to be held in trust for the tribe by the United States within the scope of 25 U.S.C. § 465. 411 U.S. at 155 n.11. Despite the trust and tax-exempt status of the land and the fact that the taxes were directly imposed upon the tribe, the Court upheld imposition of the gross proceeds tax since, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-49.

(Continued on following page)

uncontroverted facts here, *Jones* dictates a conclusion that the gross proceeds and severance taxes may be constitutionally applied to coal production on the off-reservation ceded strip, the court of appeals justified its purported application of *White Mountain* interest-balancing standards by judicially redrafting the 1958 Act. Having effectively redrawn reservation boundaries, the court then rewrote the district court's factual findings and, relying on a palpable misinterpretation of this Court's recent decision in *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987),[11] effectively abandoned all pretext

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(Continued from previous page)

In contrast to *Jones* are, most importantly, *White Mountain* and *Ramah Navajo School Board v. Bureau of Revenue, supra*, which involved the imposition of state taxes on non-Indian concerns doing business with tribally-controlled entities within reservations. *White Mountain*, whose analysis controlled the result in *Ramah*, began its preemption analysis by noting that "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members" exist: (1) preemption by federal law, and (2) infringement " 'upon the right of reservation Indians to make their own laws and be ruled by them.' " 448 U.S. at 142. The Court recognized that difficult questions are often presented by a state's assertion of regulatory authority over non-Indians within a reservation, which "call[] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 144-45.

[11]The court of appeals read *Cabazon* as "increas[ing] the presumption against finding legitimate state interests" in Indian taxation matters. (App. 15a.) Obviously enough, though, *Cabazon*—which was not a taxation case—merely noted the already well-settled principle that tribes and their members enjoy immunity from state taxes as to on-reservation activities absent an express, contrary congressional authorization. 107 S. Ct. at 1091 n.17; *see, e.g., Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985). Consequently, in the context of such on-reservation direct taxation of tribes or their members, no interest rebalancing is necessary. *Cabazon* did not establish, as the court of appeals suggested, new preemption standards germane presently.

of interest balancing by establishing "legitimate state interests" criteria calculated to relegate to preempted status any state tax except one closely approximating a user fee. In every material respect its analysis manifests fundamental misapprehension of controlling statutory provisions, Fed. R. Civ. P. 52(a), and this Court's decisions.

The court of appeals concluded in *Crow I* (App. 98a-99a), and reaffirmed in the decision below, that the interest-balancing analysis of *White Mountain* applied here. That determination derived from its construction of the 1958 Act that all mineral interests in ceded-strip lands reserved by the United States were deemed returned to "reservation" status. The court's interpretation, however, neither finds support in the Act's language, which unambiguously restored only carefully-calculated surface acreage, nor comports with its simultaneous statement that

> [t]he 1958 Act does not give the tribe jurisdiction over the surface of the ceded strip. The Act restored only the mineral interests to tribal ownership. These interests were once part of the reservation and remain adjacent to it.

(App. 7a n.1.)[12] The court's reasoning, irrespective of its radically skewed vision of the 1958 Act, also represents

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[12]The court of appeals' statement recognizes that "reservation" status under section 2 of the 1958 Act was intended to mean only, at least with respect to the Crow Reservation, trust status and not, as its opinion otherwise indicates with respect to the mineral estate, actual redrawing of the reservation's boundaries. That no such redrawing was intended is reflected in S. Rep. No. 1508, 85th Cong., 2d Sess. (1958), accompanying the bill eventually adopted as the 1958 Act. The Senate report contained a letter from the Department of the Interior recommending various changes to the original bill, which were incorporated, and commenting that, "[i]n case of the Crow Tribe, the restored lands are outside the boundaries of the diminished reservation, and the Tribe has indicated that it will probably want to negotiate sales or exchanges in order to make the best use of the

(Continued on following page)

a quintessential example of elevating form over real-life substance. Whether or not the coal underlying Tract III or any other portion of the ceded strip has been restored to "reservation" status under the 1958 Act, it is uncontroverted that Westmoreland's activities occur on lands which are outside the reservation's boundaries, are non-tribally owned, and are subject to state, local, and generally applicable federal, but not tribal, regulation. The court of appeals' invocation of *White Mountain* standards thus rests on an extraordinary legal fiction unsupported by any decisional authority of this Court. Application of *White Mountain,* rather than *Jones,* standards presents a substantial federal question.

Moreover, even if an interest-balancing approach is appropriate, this matter presents a range of circumstances unlike those in previous cases. First, aside from *Jones,* the Court has never addressed the question of a purported exemption from state taxes where the taxed activity occurred outside a reservation. This is an important consideration (*White Mountain,* 448 U.S. at 151) which has distinct governance consequences and which the court of appeals ignored by extending the same analysis to both ceded-strip and reservation preemption issues. As developed above, Montana and its political subdivisions provide all governmental services on the ceded strip generally and to Westmoreland's mine specifically; the Tribe provides none. The precisely opposite situation adhered in *White Mountain* where the motor carrier license and use fuel taxes were assessed on the basis of the non-Indian company's use of federally-maintained reservation roads as to which the state had no responsibility; in *Ramah,*

(Continued from previous page)

lands." (App. 254a.) The report also did not mention restoration of mineral estates and, to the extent it discussed the land subject to restoration, referred only to surface acreage. The Tribe clearly understood the Act's limited purpose at the time of its consideration by Congress. See Statement of Edward P. Whiteman (App. 257a-258a).

where the gross receipts tax was imposed on a non-Indian contractor engaged in constructing federally and tribally-sponsored school facilities which the state had declined to provide; and in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 342 (1983), where the state sought to assert concurrent jurisdiction over nonmember hunting and fishing within a reservation even though it had never "contribute[d] in any significant respect to maintenance of these resources and [could] point to no other 'governmental function it provides[.]'" The state governmental interests here are not only far stronger than in *White Mountain* or later cases but are also clearly not limited, as the court of appeals held, to costs demonstrably and directly associated with Westmoreland's production.

Second, *Crow I* determined that the legal incidence of the gross proceeds and severance taxes falls on the non-Indian producer, Westmoreland, and not the Tribe. (App. 87a-90a.) This conclusion vitiates any preemption claim predicated on notions of tribal immunity from state taxation since, "[o]nce mined . . . , title to the coal is vested as personal property in the lessee or permittee as soon as it is mined and removed from its original place, subject only to the royalty rights of the lessor." *Commonwealth Edison Company v. Montana*, 189 Mont. 191, 211, 615 P.2d 847, 858 (1980), *aff'd*, 453 U.S. 609 (1981).[13] The present

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[13]The court of appeals' analysis below failed to recognize the full implication of *Crow I*'s incidence holding. The court thus relied heavily on the discussion in *Cabazon* of *Indian immunity* from state taxation in opining, as noted above, that "[t]he Supreme Court has increased the presumption against finding legitimate state interests." (App. 15a.) It later stated that "[a]ny assertion of state authority over *tribal interests* must be assessed against the traditional notions of Indian sovereignty" and that "Montana taxes mineral resources that *are* 'a component of the reservation land itself[.]'" (App. 19a (emphasis added).) Nonetheless, unlike the *Cabazon* gambling regulation, the challenged taxes here are imposed on non-Indians and on the contract sales value of the mined coal—not, as the court of appeals' analysis suggests, on the Tribe or on the *in situ* value of the coal.

matter, moreover, does not involve, as *White Mountain* and *Ramah* did, taxes based upon a value determined exclusively with reference to a narrow, closed business relationship between tribal and nontribal entities and contractually passed through to the tribe. *White Mountain,* 448 U.S. at 140; *Ramah,* 458 U.S. at 835. The taxes clearly impose no economic burden on the Tribe. *See Ramah,* 458 U.S. at 844 n.8. Finally, any generalized federal interest in tribal economic development (*cf. Cabazon,* 107 S. Ct. at 1092-93) has never been extended by this Court to prohibit an indirect adverse effect of state taxes on a tribe caused by taxation of nonmembers, and *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 151 n.27, 156-57 (1980), strongly indicates such interest may not be so expansively applied. *Accord Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463, 482 (1976); *see also California State Board of Equalization v. Chemehuevi Indian Tribe,* 106 S. Ct. 289 (1985) (*per curiam*).[14]

Third, and most significantly, the court of appeals' decision was predicated on an extreme view of the 1938 Act's preemptive scope. The court thus held that preemption is presumptively mandated by the Act whenever there is "at least some negative impact on the coal's marketability" (App. 12a) and then narrowly circumscribed the "legitimate" state interests which may serve

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[14]The Tribe has pointed to a 1982 amendment to the Westmoreland lease, under which it receives an amount equal to the gross proceeds and severance taxes not paid to Montana, as evidence of the taxes' direct impact. Unlike the tribal entities in *White Mountain* and *Ramah,* though, the Tribe unquestionably pays none of the tax amounts and, to the extent its financial interests would be furthered by recovering monies otherwise tendered to Montana, stands in no different position than the tribal smokeshops in *Washington v. Confederated Tribes of Colville Ind. Res.,* 447 U.S. at 156, since this element of profit derives solely from a claimed exemption to state taxation.

to rebut that presumption.[15] Its reasoning, which derived from an independent reassessment of trial evidence and conflicted with the district court's factual findings, was premised on the notion that the gross proceeds and severance taxes have made ceded-strip coal less marketable and thereby decreased potential tribal royalties. Nonetheless, even if the court of appeals' factual conclusions were correct and even though one of the goals of the 1938 Act was "to insure that Indians received 'the greatest return from their property' " (*Montana v. Blackfeet Tribe*, 471 U.S. at 767 n.5), nothing in the Act suggests that non-Indian lessees like Westmoreland mining outside a reservation must be exempted from tax liability in the hope that such exemption will, in whole or part, be passed on to the tribal lessor.[16] The court of appeals' sweeping analysis, logi-

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[15]The court of appeals thus did not actually apply an interest-balancing analysis but simply held the gross proceeds and severance taxes preempted in the absence of a showing that the revenues generated by them corresponded to those costs directly flowing from operation of the Absaloka facility. The taxes, however, are general revenue measures, not fees for services rendered, and are designed to fund a broad range of present and future governmental activities—some having particular applicability to Westmoreland's mine and others more generally relating to the "privileges of living in an organized society[.]" *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 522 (1937).

[16]S. Rep. No. 985, 75th Cong., 1st Sess. (1937), served as the source for the objectives of the 1938 Act identified in *Blackfeet*. However, nothing in that report discussed the issue of taxation, and the report, insofar as it mentioned "achieving the greatest return from [Indian] property" focused only on the need to tailor tribal mineral leases to the geological characteristics of the particular deposit—flexibility which the Department of the Interior believed was denied under then-existing law. *Id.* at 2-3 (App. 246a-248a). Similarly, neither the Act nor its implementing regulations address any matters, including taxation, which pertain to the relationship between a lessee and a state after the lessee has assumed ownership of the involved mineral.

cally extended, permits tribes to acquire mineral resources off-reservation and, under the protective aegis of the 1938 Act, bestow a vicarious tax exemption upon non-Indian lessees.

In sum, the facts and governing statutes here differ materially from those in *White Mountain* and *Ramah* whose analytical standards were nominally applied by the court of appeals. Whether those standards are relevant and, if so, how the competing state, federal, and tribal interests should be balanced present an important federal question warranting determination by this Court.

B. Infringement on Tribal Sovereignty

The court of appeals concluded that the gross proceeds and severance taxes are preempted without reference to the 1938 Act because they impermissibly interfere with the Tribe's sovereignty. It reached this result even though recognizing that the Tribe has no governmental jurisdiction over the ceded strip and has constitutionally disclaimed any right to tax nonmember activities outside the reservation's boundaries.[17]

The use of tribal sovereignty as an independent barrier to the assertion of state laws has, as most recently indicated in *Rice v. Rehner,* 463 U.S. 713 (1983), been largely undermined by *White Mountain* and later decisions. Sovereignty values should instead be considered as part of that complex of state, federal, and tribal interests required to be balanced in determining whether preemption has occurred. Where no tradition of immunity

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[17]Although the Tribe adopted in 1982 an ordinance imposing a 25 percent severance tax on both reservation and ceded-strip coal production, the Department of the Interior has refused to approve the ordinance as to ceded-strip mining because of the constitutional disclaimer and concern over whether such taxing authority exists off-reservation irrespective of the disclaimer. (App. 53a.)

from state regulatory authority exists as to a particular matter, the tribal sovereignty interest will ordinarily have little weight. *Rehner*, 463 U.S. at 719-20. Instantly, there is no such tradition—since the Tribe has no governmental responsibility for the ceded strip and, more specifically, no taxing powers as to Westmoreland's activities thereon. The asserted significance of its sovereignty interest is thus reduced, as reflected in the court of appeals' opinion, to the alleged indirect economic impact of the taxes.[18]

Whether notions of tribal sovereignty have any application to off-reservation taxing by a state has never been addressed by this Court. *Jones* strongly suggests that they do not. Nevertheless, even if it is assumed that *White Mountain* standards are appropriate and interest balancing therefore necessary, the court of appeals' reasoning ignored both the absence of an established tradition of authority to control, as a sovereign and not merely mineral owner, Westmoreland's activities on the ceded strip and *Washington v. Confederated Tribes of Colville Indian Reservation, supra,* in which the Court stated, with reference to on-reservation cigarette sales, "that the Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all." 447 U.S. at 151 n.27. Thus, as the Court also observed in *Colville:*

> While the Tribes do have an interest in raising revenue for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues and that

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[18]It must be emphasized that Montana has not attempted, and has no incentive, to prevent the Tribe from leasing its coal interests on the ceded strip. This matter markedly differs from *Cabazon*, 107 S. Ct. at 1094, where "the current federal policy is to promote precisely what California seeks to prevent."

> interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

Id. at 156-57. Aside from the nature of the commodity and irrespective of whether the Tribe is simply "marketing [its] tax exemption to nonmembers" (*id.* at 157), *Colville,* when read with later cases, militates against the court of appeals' exclusive reliance on the purported economic impact of the taxes as a sufficient basis to find impermissible interference with tribal sovereignty. Whatever value ultimately is assigned to such sovereignty interest under the circumstances here, however, the court's analysis and conclusion on the sovereignty issue present a substantial federal question.

II. The Court Of Appeals' Determination That A Justiciable Or Ripe Controversy Exists Concerning The On-Reservation Validity Of The Gross Proceeds And Severance Taxes Raises A Substantial Federal Question.

The court of appeals not only reversed the district court's determination that no justiciable controversy warranting declaratory relief existed as to on-reservation application of the gross proceeds and severance taxes but also concluded that the taxes were preempted. It found a justiciable controversy since, allegedly because of the taxes, "the lessee cannot find a buyer, making it difficult for Crow to find a lessee." (App. 20a.) The grounds for preemption were those upon which the taxes' invalidity as to ceded-strip production was predicated.

The decision below determined important rights in a factual vacuum and in the absence of "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain,* 448 U.S. at 145. The court thus declared unconstitutional the gross

proceeds and severance taxes even though there has been no coal production within the reservation and, therefore, no opportunity to observe their effects on government services. This determination, which is factually intensive and difficult (*cf. Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 629 (1981)), cannot be made on the present record and should not be attempted without a project sufficiently defined to permit reasoned impact analysis. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Association,* 452 U.S. 264, 295 (1981); *Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 304 (1979). Indeed, the United States argued against the granting of certiorari to review *Crow I* precisely "because the courts below have not yet developed a record or made factual findings upon which such a particularized inquiry would rest." Brief for the United States as Amicus Curiae, O.T. 1982, No. 81-1852, p. 8. The court of appeals' summary rush to judgment as to this aspect of the case raises a significant federal question under the justiciability or ripeness doctrines[19] and Indian law principles.

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[19]*Compare Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240 (1937) (a justiciable controversy under U.S. Const. art. III "must be a real and substantial controversy, admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts"), *with Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 201 (1983) ("the question of ripeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration' "); *see generally* 13A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3532.1 (2d ed. 1984) ("[t]he line [between the justiciability and ripeness doctrines] is so thin that no substantial benefit is to be gained by efforts to draw it").

CONCLUSION

The appellants respectfully request that probable jurisdiction be noted and that plenary briefing and argument on the merits be ordered.

Respectfully submitted,

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August 1987

87-343 (2)

Supreme Court, U.S.
FILED
AUG 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-——

In The

Supreme Court of the United States

October Term, 1987

STATE OF MONTANA; JOHN D. LaFAVER, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; TREASURE COUNTY, Montana; YELLOWSTONE COUNTY, Montana; LORRAINE HAMILTON, Treasurer, Big Horn County, Montana; KATHLEEN THOMAS, Treasurer, Treasure County, Montana; and MAY JENKINS, Treasurer, Yellowstone County, Montana,

Appellants,

vs.

CROW TRIBE OF INDIANS; UNITED STATES OF AMERICA; and WESTMORELAND RESOURCES, INC.,

Appellees.

ON APPEAL FROM THE NINTH CIRCUIT COURT OF APPEALS

APPENDIX TO JURISDICTIONAL STATEMENT

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1. Opinion of Court of Appeals Filed June 11, 1987

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE CROW TRIBE OF INDIANS; FOREST HORN, a member of the Crow Tribe and Chairman of Crow Tribal Council; TED HOGAN, a member of the Crow Tribe and Secretary of the Crow Tribal Council; JIGGS YELLOWTAIL, a member of the Crow Tribe; BARNEY OLD COYOTE, a member of the Crow Tribe,

Plaintiff-Appellant,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

STATE OF MONTANA,

Defendant-Appellee.

No. 86-3842

D.C. No. CV-78-110-BLG

THE CROW TRIBE OF INDIANS,

Plaintiff-Appellant,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellant,

v.

THE STATE OF MONTANA,

Defendant-Appellee,

and

WESTMORELAND; WESTMORELAND, Westmoreland Resources, Inc.,

Defendant-Intervenor-Appellee.

No. 86-3845

D.C. No. CV-78-110-BLG

OPINION

Argued and Submitted

April 6, 1987—Seattle, Washington

Filed June 11, 1987

Before: James R. Browning, Eugene A. Wright, and Cynthia Holcomb Hall, Circuit Judges.
Opinion by Judge Wright

Appeal from the United States District Court for the District of Montana

James F. Battin, Chief District Judge, Presiding

COUNSEL

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Daniel M. Rosenfelt, Albuquerque, New Mexico, for the plaintiffs-appellants.

N. Jean Bearcrane, Billings, Montana, for the appellant.

Laura E. Frossard, Washington, D.C., for the plaintiff-intervenor-appellant.

OPINION

WRIGHT, Circuit Judge:

This case, which comes before us a second time, presents two primary issues: (1) does federal action preempt the application of Montana's coal taxes to coal mined on Indian tribal property; and (2) do these taxes infringe unlawfully on the Crow Indians' tribal sovereignty? We answer both questions in the affirmative and reverse the judgment of the district court.

PROCEDURAL HISTORY

This is an appeal by the Crow Tribe, with the United States intervening on behalf of the Tribe, from a district court judgment upholding the application of Montana taxes on coal extracted from tribal land. The district court abstained from deciding whether the taxes could be imposed on revenues from coal mined on the reservation proper. It found that issue nonjusticiable.

The Crow Tribe brought action against Montana in 1978, joining three Montana counties and their treasurers. That action sought declaratory and injunctive relief against the imposition of the state's severance and gross proceeds taxes on coal mined from the reservation and what has been referred to as the "ceded strip."

The district court dismissed that action for failure to state a claim. *Crow Tribe of Indians v. Montana,* 469 F. Supp. 154 (D. Mont. 1979). This court reversed and remanded. *Crow Tribe of Indians v. Montana (Crow I),* 650 F.2d 1104 (9th Cir. 1981), *amended,* 665 F.2d 1390 (1982). We indicated that if the Tribe could show that the Montana taxes deprived it of "a large portion of the economic benefits of its coal," *Crow, I,* 650 F.2d at 1113, or "diminish[ed] the Tribe's own power to regulate," *id.* at 1114, these taxes would conflict with federal statutes that were intended to allow Crow to regulate the development of its natural resources. Our decision provided, however, that if Montana showed that these taxes were "carefully tailored to effectuate the state's legitimate interests, [they] might survive." *Id.*

Upon remand, the district court upheld the application of Montana taxes to coal extracted from the "ceded

area'' and abstained from deciding whether the taxes could be imposed on revenue from coal mined on the reservation proper.

FACTS

In 1904, Congress enacted legislation requiring the Crow Tribe to cede to the United States its interests in the surface area and underlying minerals of a portion of its reservation (''the ceded strip''). Act of April 27, 1904, Ch. 1624, 33 Stat. 352; *Little Light v. Crist,* 649 F.2d 682, 685, 689 (9th Cir. 1981). The United States was to hold in trust for Indians the surface area and underlying minerals rights to the ceded strip. The United States was to sell the property and pay the proceeds to the Indians. *Id.* Approximately 98% of the surface area of the ''ceded strip'' was conveyed to non-Indians.

The government conveyed ceded strip properties in different forms: (1) rights to both the surface area and underlying minerals and (2) rights to the surface area only. A portion of the ceded strip was never conveyed, leaving both the surface area and underlying mineral interests in a trust held by the United States for the benefit of the Crow Tribe.

In 1934, Congress enacted the Indian Reorganization Act (IRA), 25 U.S.C. § 461 (1982), which returned to the various tribes previously ceded lands and underlying minerals. The Act transferred ownership rights from the United States back to the Indians. The tribes involved could choose to accept or decline the arrangement. Crow declined.

In 1958, Congress passed another Indian Restoration Act, which *required* Indians to accept ownership of vacant lands ceded previously. It restored the previously undisposed minerals to the *full* beneficial ownership of the Crow Tribe. This terminated the United States' right to lease or sell these minerals for the Tribe. The parties agree that the Tribe *owns* these minerals underlying the ceded area, but whether they are now part of the Crow reservation is disputed.

In 1972, the Tribe leased to Westmoreland Resources the rights to mine coal underlying the ceded strip. The surface area of the leased land had been sold to non-Indians. Rights to the underlying minerals had not been conveyed. Such leasing activity is governed by the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396(a)-(g) (1982), and regulations promulgated thereunder.

In 1975, Montana imposed two taxes on all coal producers. The first was a severance tax, "imposed on each ton of coal produced in the state." Mont. Code Ann. § 15-35-103 (1985). The rate varies from three to 30% of the coal's value, depending on quality and whether the mining is on the surface or underground.

The second tax is the gross proceeds tax, imposed on each person engaged in coal mining. Mont. Code Ann. § 15-23-701. The rate is determined by applying the relevant county's property tax to the assessed value of the coal producer's gross yield from coal contract sales. The amount varies by county and year.

Between 1975 and 1982, Westmoreland paid $53,800,000 in severance taxes and $8,100,000 in gross proceeds

taxes for its ceded strip mining operations. Westmoreland has since paid $20,000,000 on these taxes to the district court registry.

In 1976, the Tribe imposed its own severance tax of 25% for coal mined on the reservation. In 1982, it enacted a similar tax for coal mined on the ceded strip. The Department of Interior rejected the latter tax because the Crow constitution disclaimed tribal jurisdiction over the ceded strip. In 1982, Westmoreland agreed to pay the tribal tax, but received credit for the coal taxes paid to Montana. Hence, it has paid no severance tax to Crow.

Interior approved the application of Crow severance taxes to coal produced on the reservation proper. In 1980, Shell Oil and Crow agreed to a lease contract for mining coal on the reservation. It required Shell to pay Crow an amount equal to the Montana coal taxes less whatever was required to be paid to the state.

Shell never began to mine, being unwilling to begin digging because it was unable to find a buyer for its coal. It surrendered its rights to the mine in December 1985.

DISCUSSION

I. Preemption

The district court found that the minerals underlying the ceded strip were technically outside the reservation boundaries. It held that tribal activities conducted outside the reservation "present different considerations" than do activities conducted within. " 'Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citi-

zens of the State.'" (Quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)). The district court stated also that, in order for the taxes to be preempted, there would have to exist federal legislation that "*expressly* bars . . . Montana . . . from imposing its coal taxes." It found no express federal prohibition against the taxes and, therefore, held they were *not* preempted.

The court erred in these findings and in the conclusions of law, which we review de novo. *United States v. McConney*, 728 F.2d 1195 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). The district court's legal conclusions deviate from this court's 1981 opinion and misapply recent Supreme Court cases that establish the relevant preemption analysis. We found, contrary to the district court, that the underlying minerals are a "component of the reservation land itself." *Crow I*, 650 F.2d at 1117. This follows the plain meaning of the 1958 Act, which restored to reservation status all lands returned to tribal ownership under the Act.

> Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made part of the existing reservations for such tribe or tribes.

Act of May 19, 1958, 72 Stat. 121.[1]

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[1]The 1958 Act does not give the Tribe jurisdiction over the surface of the ceded strip. The Act restored only the mineral interests to tribal ownership. These interests were once part of the reservation and remain adjacent to it.

The law of the case as expressed in our previous opinion has been ignored. We held in *Crow I* that, irrespective of the location of the tribal coal on or off the reservation, the Mineral Leasing Act of 1938, 25 U.S.C. §§ 461-479 (1982), applied to the Tribe's coal leases. *Crow I,* 650 F.2d at 1114 n.16.

The preemption analysis in Indian tribal cases differs from that used in other circumstances. *Crow I,* 650 F.2d at 1109 (citing *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 140, 149 (1980)); *see also Ramah Navajo School Board v. Bureau of Revenue,* 458 U.S. 832, 838 (1982). Congress attaches great significance to the "firm federal policy of promoting tribal self-sufficiency and economic development." *Crow I,* 650 F.2d at 1109 (quoting *Bracker,* 448 U.S. at 140); *see also California v. Cabazon Band of Mission Indians,* 107 S.Ct. 1083, 1092 (1987); *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334-35 (1983). It intended that this policy be given "broad preemptive effect." *Crow I,* 650 F.2d at 1109. Moreover, "[n]o express congressional statement of preemptive intent is required; it is enough that the state law conflicts with the *purpose* or *operation* of a federal statute, regulation, or policy." *Id.* (emphasis added).

We have already indicated that the purpose of the 1938 Act was, *inter alia,* to revitalize tribal governments by giving them control over the lease of their lands subject to the approval of the Secretary of Interior, and to promote tribal economic development. *Crow I,* 650 F.2d at 1112-13; *see also Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 767 n.5 (1985) (a major purpose of the 1938 Act is "to ensure that Indians receive 'the greatest return

from their property' ") (quoting S. Rep. No. 2, H.R. Rep. No. 1872, 75th Cong., 3d Sess. 2 (1938)).

If the Tribe demonstrates that the taxes imposed by the state interfered with the policies underlying the 1938 Act, the taxes will be subject to preemption. *Crow I,* 650 F.2d at 1113; *see also Cabazon,* 107 S. Ct. at 1092.

A. Interference with Tribal Economic Interests

We review for clear error the district court's finding that the Montana taxes did not interfere with federal or tribal court policies. Fed. R. Civ. P. 52(a); *LaDuke v. Nelson,* 762 F.2d 1318, 1321 (9th Cir. 1985).

The district court did not find that the taxes interfered with federal Indian law and policies. Rather, it found that Westmoreland's marketing problems were due to a decrease in coal demand from Montana's traditional coal buyers.

Montana argues that its taxes do not burden Crow's economic interests because the Tribe itself does not pay the tax. In other words, the taxes were imposed on the lessee, Westmoreland, and the Tribe had no duty to reimburse. So, says Montana, the Tribe's economic interests were not affected.

We have already rejected this argument. *Crow I,* 650 F.2d at 1113 n. 13. The state taxes increase the costs of production by the coal producers, reducing in turn the royalty that can be paid the Tribe. The taxes also forced the coal producers to charge higher prices, reducing the demand for their Montana coal and resulting in fewer sales for the producers and fewer royalties to the Tribe.

Montana argues that it may impose these taxes under *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980). *Colville* held that the state could tax cigarettes purchased by non-Indians at tribal smokeshops. *Id.* at 161. Principles of preemption and tribal self-government do not authorize Indian tribes to "market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* at 155.

But the Court has distinguished *Colville* from cases in which the Tribe was trying to market a product generated on the reservation by activities in which the Tribe had a strong interest. *See Cabazon,* 107 S. Ct. at 1093-94. In *Cabazon,* the Court held that state regulation of Indian-run bingo games was preempted by federal action. *Id.* at 1092-95. Unlike the tobacco sold in *Colville,* bingo was not a product that the Indians imported for resale to non-Indians. *Id.* at 1093.

The Indians had invested considerable time and resources into the enterprise. *Id.* at 1094. The tribes there were "generating value on the reservations through activities in which they have a substantial interest." *Id.* The Court in *Cabazon* explicitly noted that this was *not* the case in *Colville.* The tribes were merely marketing their exemption from state cigarette taxes. *Id.* at 1093.

Clearly, this case resembles *Cabazon* more than it does *Colville.* The coal is the Tribe's property, a natural resource. Its lease brings revenue that represents value generated by tribal activities and in which the Tribe has a substantial interest. *Colville* does not apply.

We should consider the economic aspects and the practical effects of Montana's severance and gross proceeds taxes.[2]

The Tribe cites a study prepared by an economic research firm, referred to as the NERA report. It showed that the Montana coal tax forced coal producers to raise coal prices. That resulted in reduced demand for Montana coal. Montana's customers stopped buying from Montana producers and went to Wyoming and other states that have lower coal taxes. The report says that in 1975, before the taxes were imposed, Montana accounted for 40.6% of the Northern Great Plains coal output. Wyoming produced 43.8%. In each subsequent year, Montana has lost, while Wyoming has gained, in the percentage of this region's coal production. By 1982, Montana produced 18.2%, and Wyoming 69.5%, of the region's coal output.

Production by the coal producers on Crow tribal properties fell from 7.4 to 2.78% during that time. The NERA report concluded that the taxes prevented Crow coal from competing with that of Wyoming and resulted in far less Crow coal production than would have otherwise occurred.

Montana counters that the NERA report is unreliable. It refers to testimony that the report was "grounded on

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[2]Figures submitted by the Crow Tribe tell us that the Montana taxes totalled an effective rate of 32.9%, more than twice that of any other state's coal taxes. Montana counters that the effective rate is 21-22%. It appears that experts for the parties reached different results because they used different methods of calculating the effective tax rates.

a supply [and] demand theory which failed to consider adequately the myriad of factors influencing a [buyer's] determination to use certain coal." Montana's expert accounted for the differences in production by noting Wyoming coal's lower sulfur content, and the increased population in Wyoming's traditional buyer markets. Further, says Montana, the taxes when factored into total coal sales constituted only one to three percent of the price.

Montana places some emphasis also on the cost of coal transportation and says that, for distances of more than 1,100 miles, it costs less to ship Wyoming coal than it does Montana coal. This had a far greater impact on price than did the taxes, Montana argues.

From all of this, one must conclude that the taxes imposed are the components that differ most clearly between Montana and Wyoming. The timing of the loss in coal production in Montana and the losses sustained by the Crow Tribe correspond exactly with the imposition of taxes. The district court erred in relying on transportation costs. Coal production form areas in Montana just across the Wyoming border decreased after the taxes were imposed, while the Wyoming production experienced a large increase.

Montana has failed to rebut evidence that the taxes had at least some negative impact on the coal's marketability. The district court did not find the impact of taxes to be neglible. As long as the taxes "interfere[] or [are] incompatible with federal and tribal interests reflected in federal law," they are deemed preempted "unless the state interests at stake are sufficient to justify the assertion of state authority." *Cabazon,* 107 S. Ct. at 1092 (quoting *Mescalero*, 462 U.S. at 333-34). Any finding of interference, then, would be enough to subject the state taxes to pre-

emption. This record shows interference. The district court erred in failing to so find.

B. Legitimacy of State Interests

If the state coal taxes conflict and interfere with federal or tribal objectives, we must review the legitimacy of the state's interests, and the relationships of the taxes to achieving those interests. *Crow I,* 650 F.2d at 1113-14; *see also Bracker,* 448 U.S. at 148-49 (to justify its assessment of taxes, state must identify a regulatory function or a service it performs).

We have identified interests that we thought might justify these taxes: (a) the additional government services required by miners and others involved in coal production; and (b) the costs of treating the pollution and solid waste disposal that attend coal production. *Crow I,* 650 F.2d at 1114.

The district court found that Montana and its political subdivisions provided numerous services to the ceded strip. It held that the costs of these services could not be documented precisely and were unquantifiable. The court said that many of coal mining's effects were unknown: "[f]or example, reclamation is not yet complete and its degree of success is uncertain." The court said that some of coal mining's effects could be identified if not precisely quantified, e.g., air and water pollution, soil and plant damage, harmed wildlife, and road wear. It noted also the socioeconomic effects of the Westmoreland mine, particularly the disruption in the lives of those living on the ceded strip. The court observed that the burden of providing services

had fallen upon state and local governments, not upon the Tribe.

These findings are correct, says Montana. It cites expert testimony that the appellant's NERA report failed to consider environmental and other long term consequences of coal development. Montana contends that it is not necessary to account for the economic and social factors in setting its tax rate.

The state cites *The Commonwealth Edison Co. v. Montana,* 453 U.S. 609 (1981), which on its face seems to apply. But there the issue was whether a state's coal severence tax violated the Commerce or Due Process Clauses because the amount of tax revenues was not "fairly related" to the government services required by coal mining. *Id.* at 620. That analysis differs from the one used to determine whether state actions affecting Indians are preempted by existing federal policy. In denying Montana's petition for rehearing in the previous appeal, we rejected expressly *Commonwealth Edison. Crow Tribe v. Montana,* 665 F.2d 1390, 1391 (9th Cir. 1982) (amending *Crow I*).

We held that the preemption analysis requires a court to consider the state's legitimate interests. Ultimately the question is one of reviewing the state, federal, and tribal interests involved and whether, in this context, the state action is contrary to federal action.

In *Cabazon,* the Supreme Court stated that "the federal tradition of Indian immunity from state taxation is very strong and . . . *the state interest in taxation is correspondingly weak.* Accordingly, it is unnecessary to rebalance these interests in every case." 107 S. Ct. at 1091 n.17

(emphasis added). The Supreme Court has increased the presumption against finding legitimate state interests. Hence, even if we agree with the district court that Montana taxes support legitimate interests, the interests described in *Crow I*, and argued by Montana, may no longer be sufficient.

The Court found in *Cabazon* that:

> [t]he tribal [bingo] games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests.

Id. at 1093.

The same may be said here. Coal production is vital to the economic development of the Crow Tribe. Like the bingo games, Crow's coal leases "generate funds for essential Tribal service and provide employment for Tribal members." *Id.* at 1094.

Given the significance *Cabazon* attaches to these federal and tribal interests, Montana faces a heavy burden in overcoming these with a showing of legitimate state interests. Even if Montana's interests are sufficiently legitimate, there is substantial evidence that the coal taxes are not narrowly tailored to support them.

C. Relationship Between Taxes and State Interests

The district court was unable to quantify or forecast the current or future costs resulting from coal develop-

ment. It ignored hard evidence. The NERA report concluded that from 1970 to 1982, population growth associated with coal mining resulted in $38 million of government costs. But for that period, state, local, and excise taxes, *other than the coal taxes,* provided state and local governments with $42 million.

There may be additional costs associated with treating the environmental consequences of coal production, but the state failed to provide a specific figure. Instead it would charge a heavy tax for indeterminable future costs, imposing on the Tribe the burden of the doubt.

It appears further that many of these environmental concerns have been addressed already by federal and state regulations. Montana's environmental interests are protected by the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201, *et seq.* (1982), which imposes surface mine bonding and reclamation fee requirements. *Id.* at §§ 1258, 1269. EPA and state programs carefully regulate point source discharge from the mines.

The district court found that state taxes were narrowly tailored to achieve legitimate interests. This is undermined by Montana's use of these tax revenues. The severance tax statute requires that 50% of the revenues be allocated to a permanent trust fund and, according to the NERA report, 19 to 30% to the state general fund. Mont. Code Ann. § 15-35-108 (1985). These two funds are not dedicated to environmental or coal-related services. The three coal-related funds established by the severance tax statute were to be initially allocated 31% of the severance tax revenues. As of 1981, they received only 8.75%. This indicates a distant, rather than carefully tailored, re-

lationship between the severance tax revenues and the coal-related services.

It appears that Montana intended, at least to some extent, to use the taxes to profit from the Indians' valuable coal resources:

> [t]he Montana legislature predicated its tax upon a finding that strip coal 'is in sufficient demand that at least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes.' . . . Mont. Code Ann. § 15-35-101(1)(e). By setting the severance tax rate at 30 percent of value, Montana made plain its intention to appropriate most of the economic rent.

Crow I, 650 F.2d at 1113. We stated that the Tribe's coal "is not the state's to regulate. . . . it has no such legitimate interest in appropriating Indian mineral wealth." *Id.* at 1114.

Accordingly, even if we assume Montana's interests were legitimate, the district court clearly erred in finding that the taxes were narrowly tailored to achieve them. Montana coal taxes are preempted.

II. Tribal Sovereignty

The district court concluded as a matter of law that the Montana taxes do not infringe on tribal sovereignty. It reasoned that the application of the state's coal taxes to tribal coal mined in the ceded area did not infringe upon tribal self-government because the coal lay outside the reservation. It erred in this conclusion because the minerals underlying the ceded area are owned by the Tribe and are considered part of the Crow Reservation. *See Crow I*, 650 F.2d at 1117.

The self-government doctrine differs from the pre-emption analysis and is an independent barrier to state regulation. *Bracker,* 448 U.S. at 142-43; *Crow I,* 650 F.2d at 1110. Either is a sufficient basis to hold the state tax inapplicable to tribal coal. *Bracker,* 448 U.S. at 143.

Whether the state taxes infringe on tribal sovereignty depends on whether tribal self-government is affected. *Crow I,* 650 F.2d at 1116. The power to tax members and non-Indians alike is an essential attribute of self-government. *Kerr-McGee Corp. v. Navajo Tribe of Indians,* 471 U.S. 195, 201 (1985). Any assertion of state authority over tribal interests must be assessed against the traditional notions of Indian sovereignty. *Mescalero,* 462 U.S. at 334. State action may not infringe unlawfully "on the right of reservation Indians to make their own laws and be ruled by them." *Bracker,* 448 U.S. at 142 (quoting *Williams v. Lee,* 358 U.S. 217, 220 (1959)).

Tribal sovereignty contains a significant geographical component, and tribes have the power to manage the use of their territory and resources by both members and non-members. *Mescalero,* 462 U.S. at 335; *Bracker,* 448 U.S. at 151. Taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation is not permissible absent congressional consent. *Cabazon,* 107 S. Ct. at 1091 n.17 (citing *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164 (1973)).

While the federal tradition of Indian immunity from state taxation is very strong, *see id.,* this court has recognized that a state tax is not invalid merely because it deprives the Tribe of revenues used to sustain itself and its programs. *Crow I,* 650 F.2d at 1116. The principle of

tribal self-government is to seek "an accomodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Colville,* 447 U.S. at 156.

Montana taxes mineral resources that are "a component of the reservation land itself." *Crow I,* 650 F.2d at 1117. The tax revenue from coal production could generate funds for tribal services and provide employment for tribal members. *Mescalero,* 462 U.S. at 341. By taking revenue that would otherwise go towards supporting the Tribe and its programs, and by limiting the Tribe's ability to regulate the development of its coal resources, the state tax threatens Congress' overriding objective of encouraging tribal self-government and economic development. *See Mescalero,* 462 U.S. at 341; *Bracker,* 448 U.S. at 149. While some interference with the Tribe's economic development may be justified if the state's interests in imposing the taxes are legitimate, *Crow I,* 650 F.2d at 1113; *Colville,* 447 U.S. at 163, the State has not shown that its taxes are narrowly tailored to meet these interests. We conclude that the Montana tax is invalid because it erodes the Tribe's sovereign authority.

III. Coal Within Reservation Boundaries

The district court declined to rule whether the taxes applied to coal mined within the external boundaries of the reservation. Although Shell Oil Company had an agreement with the Tribe to mine this coal, it never did so. Because of that, the district court found there was no substantial controversy with this issue.

We disagree. The Tribe need not wait for mining to commence to challenge the taxes' application to coal mined

within the Reservation boundaries. *See Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979) (it is not necessary to await the consummation of a threatened injury to obtain preventive relief); *State of Arizona v. Atchison, Topeka & Santa Fe R.R. Co.,* 656 F.2d 398, 402-03 (9th Cir. 1981) (court may enter declaratory judgment as to validity of tax even though action is commenced prior to the effective date of the tax scheme).

The taxes are already in effect and Montana intends to apply them to this coal. These high taxes affect tribal revenues by interfering with the Tribe's coal leasing efforts. Because of the taxes, the lessee cannot find a buyer, making it difficult for Crow to find a lessee.

These taxes burden the Tribe's interests in coal within the Reservation boundaries, just as they do its interests in coal from the ceded strip, as these interests are the same. The reasons for disallowing these taxes on coal from the ceded strip apply with equal force to the coal within the Reservation boundaires.

CONCLUSION

Montana's coal taxes are preempted by federal law and policies. They interfere with tribal economic development and autonomy. The state interests they promote may or may not be sufficiently legitimate to overcome these conflicts, but even if they are, the taxes are not narrowly tailored in pursuit of these interests.

In addition, the taxes are void for interfering with tribal self-government, a separate and independent barrier to state regulation of Indian affairs. The mineral estate of the ceded strip is legally part of the Crow reservation,

and taxing Indian income derived from activities conducted on reservation property is prohibited without congressional consent. Here, Congress did not consent. Montana's interests in imposing the coal taxes do not overcome the tribe's economic and governmental interests in coal production.

Finally, because taxes on coal mined on the ceded strip are invalid, taxes on coal from the reservation proper are likewise invalid. The district court erred in holding this question non-justiciable. The taxes impair the tribe's ability to negotiate leases with Shell Oil and other coal companies. They also reduce tribal revenues by impairing the coal's marketability.

REVERSED.

2. District Court Findings of Fact and Conclusions of Law Filed September 10, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, et al., Plaintiffs, -vs- UNITED STATES OF AMERICA, et al., Plaintiff-Intervenor, -vs- STATE OF MONTANA: ELLEN FEAVER, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; YELLOWSTONE COUNTY, Montana; TREASURE COUNTY, Montana; LORRAINE HAMILTON, Treasurer, Big Horn County, Montana; MAY JENKINS, Treasurer, Yellowstone County, Montana, CLARIBEL BONINE, Treasurer, Treasure County, Montana, Defendants. WESTMORELAND RESOURCES, INC., Defendant-Intervenor.	CV178-110-BLG FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, the Crow Tribe of Indians, has filed this civil action challenging the validity of the Montana Coal Severance Tax and the Montana Gross Proceeds from Coal Tax insofar as these taxes are applied to coal produced on the Tribe's reservation and to coal produced on a ceded strip of land situated adjacent to the reservation. The Tribe seeks injunctive, declaratory, restitutionary, tax and money refunds, money damages, and other relief. Although this Court and the Court of Appeals considered the tax with respect to mining on both locations on a motion to dismiss, the evidence at trial led this Court to conclude that there is no case or controversy with respect to coal mined on the reservation. *See infra* Conclusion of Law II. The following findings, therefore, focus on coal mined on the ceded strip.

This matter came on for trial before the Court, sitting without a jury, on January 9, 1984. The plaintiff was represented by counsel Robert S. Pelcyger and Dale T. White of Boulder, Colorado. Defendants were represented by counsel Jerome Anderson and John W. Ross of Billings, Montana, Assistant Attorney General Chris D. Tweeten of Helena, Montana, Treasure County Attorney James R. Carlson, Jr., of Hysham, Montana, Big Horn County Attorney James E. Seykora of Hardin, Montana, and Yellowstone County David W. Hoefer of Billings, Montana. Defendant-intervenor Westmoreland Resources, Inc., was represented by Gerald B. Murphy of Billings, Montana, and Daniel H. Israel of Denver, Colorado. The plaintiff-intervenor United States was represented by Department of Justice attorney Stephen E. Carroll. From the testimony and evidence submitted by the parties and the briefs and

arguments of counsel, the Court now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Parties

1. The plaintiff, Crow Tribe of Indians, is an American Indian tribe, with the governing body, the Crow Tribal Council, duly recognized by the United States Secretary of the Interior as the governing body of the Crow Indian Reservation.

2. The defendant State of Montana is a sovereign state of the Union, pursuant to the Enabling Act of February 22, 1889, 22 Stat. 676. Defendants Big Horn County, Yellowstone County, and Treasure County are political subdivisions of the State of Montana. Defendant Hamilton is Treasurer of Big Horn County; defendant Jenkins is Treasurer of Yellowstone County; defendant Bonine was Treasurer of Treasure County.

3. Defendant-Intervenor Westmoreland Resources, Inc., is a Deleware corporation having its principal place of business at Billings, Montana.

Ceded Strip—Creation and Description

4. The Crow Reservation was first set apart by the Treaty of Fort Laramie, 11 Stat. 749 (1851), and encompassed 38.5 million acres in what is now southern Montana and northern Wyoming. The second Treaty of Fort Laramie, entered into in 1868, 15 Stat. 649, reduced the Crow Reservation to 8 million acres situated entirely within what is now the State of Montana. The 1868 treaty set apart the reservation for the absolute and undisturbed use and

occupation of the Crow Tribe. *Montana v. United States,* 450 U.S. 544, 547-48 (1981).

5. The 1868 treaty was followed by three major cessions of territory by the Crow Tribe: the Act of April 11, 1882, 22 Stat. 157, the Act of March 3, 1981, 29 Stat. 981, and the Act of April 27, 1904, 33 Stat. 352. The third, 1904, cession reduced the Crow Reservation to its present boundaries and created the "ceded strip," an area consisting of about 1,137,500 acres which lies to the north of the acknowledged reservation.

6. Large deposits of coal underly both the Crow Reservation proper and the ceded strip.

7. Most of the surface in the ceded strip is owned in fee by non-Indians.

8. The ceded area has a population of approximately 4600. Approximately 1% of the population is Indian.

9. The ceded area has been developed by non-Indians pursuant to state and county governmental law and regulation.

10. Land use within the ceded strip is primarily range land, irrigated cropland, hay land, pasture, forest cover, and non-irrigated cropland. Rural residential housing is located throughout the ceded strip.

11. The ceded strip includes one incorporated municipality, numerous unincorporated communities, a variety of special districts, and public school districts which are governed by state law.

12. The ceded area is not a legally constituted political subdivision of the State of Montana, but it lies within

the boundaries of Big Horn, Treasure, and Yellowstone Counties. It does not conform to any political or administrative boundaries for which any economic or demographic data are normally collected. It receives full governmental representation in accordance with state law. This ceded area is located in the Thirteenth and Sixteenth Judicial Districts of the District Courts in the State of Montana.

Ownership of Coal Underlying the Ceded Strip

13. In 1904, the Crow Tribe ceded "all right, title, and interest" in the area presently referred to as the ceded strip. Act of April 27, 1904, 33 Stat. 352. The United States agreed to act as trustee for the Tribe, to dispose of the ceded lands under the various reclamation, homestead, and mineral laws, and to pay the Indians the proceeds of the sales. *See* 33 Stat at 361. The Indians released their possessory right to the ceded strip lands but retained a beneficil [sic] interest in the undisposed-of ceded lands. *See Ash Sheep Co. v. United States,* 259 U.S. 159 (1920).

14. In accordance with the 1904 Cession Act, lands within the ceded strip were disposed of by the United States. Under § 5 of the Act, the State of Montana received sections 16 and 36 for the support of common schools. 33 Stat. at 360. Some allotments to individual Indians were made under § 4. 33 Stat. at 358-59. The remaining lands in the ceded strip were opened to homestead entries. Under § 5, lands were offered for settlement for the price of $4 per acre. The lands that could not be sold for this price were to be offered for sale at a lesser price under such presidential proclamations as were deemed

necessary. Further dispositions were made under a number of presidential proclamations. *See* May 24, 1906, 24 Stat. 3200; September 9, 1910, 36 Stat. 2742; August 9, 1912, 37 Stat. 1759; September 28, 1914, 38 Stat. 2029; and April 6, 1917, 40 Stat. 1653.

15. Under the 1904 Act and these various proclamations, a considerable amount of both surface land and mineral estate was conveyed to non-Indians. A few thousand acres of surface lands were never conveyed. The patents issued to non-Indians for approximately 70,000 acres of coal lands expressly excluded rights to the underlying minerals in favor of the United States.

16. In 1934, Congress enacted the Indian Reorganization Act (IRA). 25 U.S.C. § 461 et seq. Under § 3 of the IRA, 25 U.S.C. § 463(a), the Secretary of the Interior was authorized to restore to tribal ownership "the remaining surplus lands of any Indian reservation opened before June 18, 1934. . . ."

17. Three months after the IRA's enactment, in September 1934, the Secretary temporarily withdrew the surplus or open Indian lands that the United States had been authorized to sell as trustee or broker for Indian tribes. 54 I.D. 559 (1934). This Secretarial Order expressly withdrew the previously undisposed-of surface lands and minerals in the Crow ceded area. *Id.* at 561-63.

18. The Secretarial Order terminated, at least temporarily, leasing by the federal government of the previously undisposed-of minerals within the ceded area pursuant to the mineral leasing laws governing public lands. In due course, the surplus or ceded lands, including previously

undisposed-of mineral interests, of tribes that elected to accept the IRA were restored to tribal ownership. *See, e.g.,* 59 I.D. 393 (1947); 60 I.D. 174 (1948).

19. The Crow Tribe elected not to accept the provisions of the IRA. *See* 25 U.S.C. § 478. Consequently, these surplus or ceded lands were not restored to tribal ownership under 25 U.S.C. § 463.

20. The Act of May 19, 1958, Pub. L. No. 85-420, 72 Stat. 121, provided

> [t]hat all lands now or hereafter classified as vacant and undisposed-of ceded lands (including townsite lots) on the following named Indian reservations are hereby restored to tribal ownership subject to valid existing rights: . . . Crow, Montana—10,260.95 [acres] . . . *Provided,* That such restoration shall not apply to any lands while they are within reclamation projects heretofore authorized.
>
> Sec. 2. Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made a part of the existing reservations for such tribe or tribes.
>
> Sec. 3. The lands restored to tribal ownership by this Act may be sold or exchanged by the tribe, with the approval of the Secretary of the Interior.

21. The two major purposes of the 1958 Act, as revealed by its legislative history, were to treat non-IRA tribes in a similar manner as IRA tribes with respect to ceded or surplus lands and to restore to tribal ownership all the surface lands and mineral interests that were withdrawn from entry by the Secretarial Order (54 I.D. 559 (1934)). S.Rep. No. 1508 (85th Cong., 2d Sess. 1-2, 2-3

(1958); H.Rep. No. 1336, 85th Cong., 2d Sess. 1-2 (1958)). Both committee reports state:

> This legislation, if enacted, will restore the lands [temporarily withdrawn by, *inter alia,* the September 1934 Order] to tribal ownership, thus terminating the right of the Federal Government to dispose of them under the cession statutes, and will assure the Indians the continued use rights.

Id. The reports expressly refer to the Secretarial Order which withdrew the previously undisposed-of ceded surface lands and mineral interests.

22. If the ceded strip minerals in which the Crow Tribe retains a beneficial interest were not restored to full tribal ownership by the 1958 Act, the Crow Tribe would not receive the same treatment as the tribes whose lands and minerals were restored under § 3 of the IRA, 25 U.S.C. § 463. *See* 60 I.D. 174 (1948); 59 I.D. 393 (1947). Similarly, excluding the Tribe's ceded strip minerals from the coverage of the 1958 Act would conflict with that Act's express purpose of fully restoring to tribal ownership all of the surface lands and minerals that had been temporarily withdrawn in September 1934.

23. No significance can be attached to the use of the term "vacant and undisposed-of ceded lands" in the 1958 Act instead of the "surplus lands" language from § 3 of the IRA. *See* 25 U.S.C. § 463. The legislative history discloses why different language was used in these similar Acts.

24. S. 1757, the bill introduced by Senators Murray and Mansfield, and H.R. 3490 and H.R. 6160, predecessor bills introduced by Representative Metcalf, had used the

phrase "surplus ceded lands of the class mentioned in the Indian Reorganization Act of June 18, 1934, Section 3 (48 Stat. 984; 25 U.S.C. § 463)" in § 1 of the bills to describe the lands that would be restored to tribal ownership. In its comments on these bills, the Interior Department recommended that the lands be described instead "as vacant and undisposed of ceded lands" in order to "avoid the necessity for a cross reference" to the IRA. The Interior Department's report expressly stated that the recommended change "relate[d] to matters of form and do[es] not affect the substance of the bill." S.Rep. No. 1508, at 3; H.Rep. No. 1336, at 3.

25. The 1958 Act was intended to, and did in fact, fully restore the previously undisposed-of minerals in the Crow ceded strip to the full beneficial ownership of the Crow Tribe. The right and power of the United States to lease or sell those minerals was terminated. This Court expressly so held in *Redding v. Morton,* CV-74-12-BLG (D. Mont. 1974):

> In 1958, Congress restored to the Crow Tribe all of the undisposed of lands in the ceded area. 72 Stat. 121 (1958). The Interior Department has interpreted this series of enactments and case law to mean that the Crow Tribe owns all of the coal underlying the surface within the ceded area. Consequently, it must be concluded that the Crow Tribe was never divested of its title to coal which was not conveyed when the United States disposed of the surface land.

Id., Slip Op. at 8. The Court of Appeals did not reach the merits of the title question in the appeal of the *Redding* case. *Cady v. Morton,* 527 F.2d 786, 791, 798 (9th Cir. (1975).

26. The Act of August 14, 1958, 72 Stat. 575, amended the 1958 Act by authorizing the purchase by the federal government of the Tribe's right to some 4900 acres within the ceded area included within the Huntley Reclamation Project. The effect of the August 1958 Act was to reduce the surface lands restored under the May 1958 Act to approximately 5360 acres. S.Rep. No. 1508, at 4-5. A provision in the August 1958 Act evidences Congress' intent to restore minerals in the ceded strip to the Crow Tribe. §1 of the August 1958 Act provides for the Tribe's retention of the minerals underlying these 4900 acres, and § 2 of that Act, 72 Stat. at 582, states "that the minerals reserved for the benefit of the Crow Tribe pursuant to Section 1 hereof shall be leased or otherwise disposed of under the laws and regulations relating to Indian trust lands."

27. The Department of the Interior has consistently treated the undisposed-of lands and minerals in the ceded area as being held in trust for the Crow Tribe. In a circular issued to explain the application of the Act of February 27, 1917, 39 Stat. 944, one of the Acts which permitted entry of the surface estate and reservation of the mineral estate, the General Land Office recognized that the Tribe retained a beneficial interest in the minerals after the surface estate was conveyed. Exhibits introduced at trial also showed that the Bureau of Indian Affairs has consistently treated the undisposed-of minerals as being held in trust for the Tribe.

28. There is a clear, consistent, and contemporaneous administrative construction by the Interior Department that the undisposed of minerals underlying the Crow ceded area were restored to full tribal ownership by the 1958 Act. *See* Exhibits 97, 87, D-435, 128.

29. Both the Crow Tribe and Westmoreland Ressource have relied on this consistent administrative interpretation. This reliance is manifested by an investment of tens of millions of dollars in a coal mine.

Surface Coal Mining on the Ceded Strip

30. In June 1972, Westmoreland, a non-Indian company, entered into two leases with the Crow Tribe to mine coal underlying about 31,000 acres of the ceded strip. One of these leases, encompassing over 16,000 acres, was cancelled in 1982 by mutual consent of Westmoreland, the Tribe, and the federal government. The second lease remains in effect and authorizes production of coal on Tract III which is located in Big Horn County on the ceded strip in sections 25, 26, and 36, Township 1 North, Range 37 East.

31. In 1974, Westmoreland's leases were amended to reflect a renegotiation and consequent increase in the Tribe's royalty rate. Agreement was also reached to renegotiate the royalty rate in ten years to a point at or about the prevailing market rate.

32. The coal leases and subsequent amendments were the result of arm's-length negotiations between Westmoreland, the Tribe, and the federal government. The leases and amendments were subject to federal approval and were approved by the Secretary of the Interior. The Tribe was free to accept or reject the terms of the agreements.

33. In October 1972, Westmoreland began construction of its "Absaloka Mine" on Tract III. Mine facilities were built on the lease tract, and a 36-mile railroad spur line was built along Sarpy Creek to connect the minesite

with the Burlington Northern line in Treasure County, Montana.

34. Surface coal mining operations at Westmoreland's Absaloka Mine commenced in Spring of 1974. Production reached 4 million tons in 1975 and has remained relatively constant, reaching a peak of 4.9 million ton in 1979 and declining since 1981. Under long-term sales contracts entered into in 1974, Westmoreland annually ships approximately 4 million tons of coal to four mid-west utilities. Such deliveries are to continue through 1993.

Surface Coal Mining on the Crow Indian Reservation

35. Although negotiations have taken place between the Crow Tribe and various mining companies, and some preliminary prospecting and exploration has been accomplished, no actual mining of coal by non-Indian lessees has occurred within the boundaries of the Crow Indian Reservation.

36. In April 1983, the Secretary of the Interior approved a 1980 coal mining agreement between the Crow Tribe and Shell Oil Company for a coal tract situated in the extreme southeastern corner of the Crow Reservation immediately north of the Wyoming border. Shell has not mined coal on the reservation nor does it have any current long-term contracts to sell reservation coal.

Governmental Services and Jurisdiction on the Ceded Strip

37. Since 1904 the State of Montana and its political subdivisions have had legal authority and responsibility for the provision of public services on the ceded strip. The state and its political subdivisions exercise exclusive jurisdiction on the ceded strip.

38. Public services provided by the state and local governments to the ceded strip include general government services, public safety, health and welfare, natural resources, public works, transportation, recreation, and culture and education.

39. The state makes available services to and exercises jurisdiction over the counties containing the ceded strip and the ceded strip itself in the same manner as it would for all other counties, or portions thereof, within the state. The state provided specific evidence that at least 11 public agencies of the state are involved in various governmental activities on the ceded strip. These state agencies include: the Department of Agriculture; Department of Commerce; Department of Fish, Wildlife, and Parks; Department of Highways; Department of Justice; Department of Health; Department of Labor; Department of State Lands; the Montana State Library; Department of Natural Resources and Conservation; and the Department of Public Service Regulation. This list does not represent the entirety of state involvement in governmental activities on the ceded strip.

40. The total cost of these services cannot be precisely documented. The state's budgeting process in a complex, interrelated system, and it is not appropriate to look at one or a few components of that system in isolation. The budgetary process is not designed to identify all monies expended in response to a certain area or taxpayer or recipient. The budgetary process and accounting system is not designed to trace funds from a taxpayer to an expenditure.

41. Big Horn, Treasure, and Yellowstone Counties have historically provided and continue to provide, num-

erous and various services to the ceded strip. County and local governments have jurisdictional authority on the ceded strip.

42. Throughout the ceded strip, law enforcement is provided by the counties. In some cases law enforcement is provided by a consolidated city/county law enforcement agency. A courthouse building is located in the county seat of each County to provide administrative facilities for the function of general government in the ceded strip. The counties provide recreational facilities as well as health and welfare, library, emergency medical, and fire-fighting services. The ceded area is completely encompassed within the elementary and secondary school districts in the three counties. The extent and cost of these facilities and services and substantial as evidenced by both the value of physical assets and the budgets of the counties.

43. There are approximately 105 miles of Federal Interstate Highway, 45 miles of state primary and secondary highways, and 600 miles of paved and unpaved county roads located on the ceded strip. The county governments of Big Horn, Treasure, and Yellowstone have responsibility for paved and unpaved roads and bridges.

44. The county seat of Big Horn County is located in Hardin, Montana. The city of Hardin was specifically excluded from the Crow Indian Reservation in 1937. Act of August 31, 1937, 50 Stat. 884. Hardin provides numerous services to and is impacted by activities on the ceded strip as evidenced by its budgets. Big Horn County budgets on a county-wide basis for all necessary public services, including road construction, maintenance, and improvements, provisions for health and welfare services, fire, ambulance

and police protection, and all normal incidental requirements of county services. Big Horn County operates a hospital and nursing home located in Hardin. Big Horn County has exclusively provided these services to the portion of the ceded strip in Big Horn County to the exclusion of the Crow Tribe and the Bureau of Indian Affairs. Examples of general governmental activities provided by Big Horn County within the ceded strip include functions of the County Commissioners' office, the County Assessor, the Clerk and Recorder, Treasurer, County Clerk, Justice of the Peace, County Attorney, and County Extension Office.

45. There are 202 miles of road responsibility located on the ceded strip in Big Horn County. The Big Horn County government is the only governmental agency which maintains and repairs state secondary highways within the county. Neither the Bureau of Indian Affairs nor the Crow Tribe contributes to the maintenance of state secondary highways on the ceded strip.

46. Big Horn County, to the exclusion of the Crow Tribe and the Bureau of Indian Affairs, has fought all fires on the ceded strip in Big Horn County.

47. Big Horn County provides substantial education facilities and services on the ceded strip. High School District No. 1 is located partly on the ceded strip.

48. Treasure County is the exclusive provider of police services, judicial services, and general governmental services in that part of the ceded strip located in Treasure County, including district court, juvenile court, fire protection services, ambulance services, road and bridge construction and repair, a medical clinic, sanitary landfill services, all schools and related services, and through inter-

local agreement with Rosebud County, services of the county to indigents.

49. The fire service and ambulance service are manned by volunteers who receive either no compensation or nominal compensation.

50. A large majority of the population in Treasure County resides on the ceded strip.

51. Treasure County's total budget has increased nearly fivefold since 1970 while tax revenue has only doubled. Treasure County has deleted or reduced services as a result, specifically deleting all library services, all mental health services, and delaying or postponing bridge repair, road maintenance, and construction. In recent years, Treasure County has levied the legal maximum rate for its general governmental levy, and since 1975 it has levied the legal maximum rate for the road and bridge funds.

52. Treasure County has approximately 11,000 acres of non-fee patent lands located on the ceded strip for which it receives no tax revenues or payments in lieu of taxes from the federal government, the Crow Tribe, or any other government. Treasure County provides all governmental services, including fire protection, law enforcement, and the other services for these lands.

53. Yellowstone County provides a full range of governmental services which are available to residents on that portion of the ceded strip within Yellowstone County. Yellowstone County maintains about 335 miles of roads in the ceded area. It also maintains seven parks located within the ceded area in Yellowstone County.

54. The Crow Tribe provides little or no governmental services to the ceded strip, and it has not exercised and does not exercise general civil jurisdiction in the ceded area. Neither the Crow Tribe nor the Bureau of Indian Affairs provides fire protection, roads, police, or other governmental services on the ceded strip. None of the Crow Tribe's ordinances apply on the ceded area, and in its constitution the Tribe has disclaimed jurisdiction outside of the boundaries of its reservation.

Jurisdiction and Services Related to Coal Mining on the Ceded Strip

55. Coal mining has an extensive, pervasive effect, both direct and indirect, on state and local government. The state and county governments provide numerous facilities, assistance, and services, to coal mining, which enable coal development everywhere in the state to occur in an orderly manner. The costs of these facilities, assistance, and services are difficult to document and quantify in their entirety, but the total cost is substantial.

56. State government is affected both in specific service provisions and general governmental activities by coal development occurring anywhere in the state including areas affected by the Westmoreland mine. The state government incurs costs in responding specifically to coal mining activities, both on and off the ceded strip, and to incremental demands placed on the government by coal development. Organizations and people associated with coal development have access to and utilize the entire array of state governmental activities, including those provided by the judicial, legislative, and executive branches.

57. The state and its political subdivisions had responsibility for and incurred the costs of developing and maintaining the governmental and physical infrastructure that allowed development of coal on the ceded strip. Westmoreland Resources has utilized and had the advantage of various services, facilities, or governmental structures that were in place when its mining activities commenced. These services, facilities, and governmental infrastructures were developed, maintained, and financed at substantial cost by the state and local governments.

58. It is not possible to identify and quantify the total extent of coal-related demands on or use of state services generally, or Westmoreland's demands on or use of state services. The state and the ceded strip counties have provided extensive services to and regulated the ceded strip and the Westmoreland mine. There are numerous examples demonstrating that such services are extensive and substantial. For example, the Montana Department of Commerce, which administers the Montana Coal Board grants, has made numerous grants to the area affected by Westmoreland's mining operation. The Montana Department of Health and Environmental Sciences inspects the Westmoreland Mine at least five times annually and has provided operational assistance for sewer lagoons in communities near the Westmoreland Mine. The Montana Department of Highways has constructed and maintained highways in the vicinity of the Westmoreland Mine. The Department of Justice has provided highway patrol and fire marshal activities in the vicinity of the Westmoreland Mine. The Montana Department of Labor and Industry has provided safety and health inspections at the Westmoreland Mine and provides the unemployment and work-

man's compensation programs for employees at the Westmoreland Mine.

59. Governmental services used by the available to the Westmoreland Mine are indistinguishable in form from those available to other mines operating in Big Horn County and elsewhere in Montana.

60. With regard to mining and reclamation at Westmoreland's Mine, Montana has historically taken the lead and continues to take the lead and do the bulk of the regulatory work. Westmoreland's Mine is regulated in the same manner as any other surface coal mine in Montana.

61. The Montana legislature has enacted numerous mining and reclamation requirements at the insistence of its citizens. Westmoreland's mining operation has been developed and conducted pursuant to Montana's mining and reclamation and environmental requirements.

62. Numerous state permits and approvals may be required in conjunction with coal mining. The State of Montana and its political subdivisions have issued a number of permits and approvals for the Westmoreland Mine.

63. The Montana Department of State Lands has issued numerous permits and prepared several environmental impact statements on the Westmoreland Mine. The Department also reviews and inspects the Westmoreland Mine on a regular basis, and it has issued a number of notices of violation to Westmoreland.

64. The Montana Department of State Lands, even after the passage of the Federal Surface Mining Control and Reclamation Act (SMCRA), still has the primary role

with regard to regulation of mining and reclamation at Westmoreland's Mine.

65. The Crow Tribe does not have an approved mining and reclamation program which applies to the ceded area. SMCRA provides that before Indian tribes may become eligible to administer a mining and reclamation program, Congress will have to amend SMCRA, and Indian tribes will have to take various actions before the tribes can be eligible and can implement a mining and reclamation program. Neither Congress nor the Crow Tribe have taken these necessary actions.

66. The Crow Tribe does not have jurisdiction to provide services on the ceded strip. The Tribe has not provided and will not provide services to the Westmoreland Mine.

67. The roles of the federal government and the Crow Tribe with regard to coal development are limited to leasing and monitoring of production. The role of the BIA is limited primarily to receiving payments and determining how much coal is mined. The BIA responsibilities with regard to the Westmoreland Mine do not extend beyond those in the lease.

70. The only functions performed by the Crow Tribe or the BIA on the ceded strip relate to the Tribe's status as royalty owner and not to its status as sovereign. Because the Crow Tribe is not responsible for governmental services associated with coal development in the ceded strip, its interest in the ceded strip is limited to the interests of any other coal lessor.

Impacts of Surface Coal Mining on the Ceded Strip

71. In addition to responsibility for providing the infrastructure which enables coal development in the state, and more particularly on the ceded area, to occur, and for responding to ongoing administrative and service demands from Westmoreland's and others' mining activity in Montana, the state and its political subdivisions have jurisdiction over, and thus responsibility for, responding to deleterious socioeconomic, political, and governmental consequences of coal mining.

72. Impacts of coal mining are characterized by a boom and bust cycle.

73. The effects and impacts of coal mining and related activities are not limited to direct impacts of mining or mine-related activities themselves. Environmental and socioeconomic effects occur which are geographically disbursed and indirectly related to project activities but which nevertheless have the potential to require state and local governmental response.

74. An important function of state government is to assume responsibility for responding to unforeseen effects of activities such as coal mining. Despite all efforts to anticipate serious adverse effects, and despite permitting and bonding requirements, the risks of significant, costly, unforeseen effects still exist. It is the responsibility of the state to obtain compensation for assuming these risks on behalf of the state's citizens.

75. The impacts caused by coal mining and related activities, including impacts from the Westmoreland Mine, can only be partially identified and documented at this time. Significant problems of measurement and quantifi-

cation prevent an accurate and complete estimation of many of those impacts Many of the effects and costs associated with coal mining are currently unknown. For example, reclamation is not yet complete, and its degree of success is uncertain.

76. Some impacts and effects of coal mining can be currently identified, but it is difficult to quantify precisely and entirely the costs and impacts associated with a particular coal mine. The nature of the effects of coal mining do not allow such complete quantification, and governmental accounting systems are not designed to track service provisions or utilizations by geographic area, taxpayer, or purpose.

77. The land ownership patterns, and the distribution of environmental and socioeconomic effects of coal mining, particularly at Westmoreland's mine on the ceded strip place the responsibility and burdens for response to these effects on state and local governments, in a manner similar to that of other coal mining activities in Montana.

78. Because few Crow Indians live on the ceded strip, the Tribe has a limited interest in insuring that the environment of the ceded strip and the public services available on the ceded strip are protected and maintained.

79. There is no evidence that the Crow Tribe provides any response to the impacts from mining on the ceded area.

80. Impacts from Westmoreland's mine are both socioeconomic and environmental. Some have occurred or will occur in the short term, and others will occur after a longer period of time. Some have occurred or will occur in the immediate vicinity of the mine, including the ceded strip, and others have occurred or will occur statewide.

81. Certain environment impacts can be measured, identified, and associated with the Westmoreland Mine at this time. For example, Westmoreland's mining activity has increased and will continue to increase the concentration of air borne particulates and other pollutants. There are surface and ground water effects or potential effects associated with Westmoreland's mine which may be substantial but which may not be known for a relatively long time. The Westmoreland Mine has short-term and perhaps long-term effects on soils, vegetation, and wildlife. Because reclamation at the Westmoreland Mine has only occurred over a relatively short time, it is too soon to determine what the effects of the Westmoreland Mine will be on vegetation. The effects on wildlife caused by the Westmoreland Mine depend significantly on long-term results of reclamation.

82. The Westmoreland Mine has caused impacts on state and county roads in the area requiring construction of certain roads and increased maintenance to others.

83. The socioeconomic effects of the Westmoreland Mine are also difficult to identify and document in their entirety at this time. The state of Montana and its political subdivisions, however, have incurred the major socioeconomic burdens associated with the Westmoreland Mine and assumed the risk for further adverse impacts. For example, most of the employees at the Westmoreland Mine live off the reservation, primarily in Hardin, Montana. The Westmoreland Mine has also indirect socioeconomic effects in other areas of Montana, including Big Horn, Yellowstone, and Treasure Counties.

84. There have been substantial impacts upon residents of Big Horn and Treasure Counties as a result of

the Westmoreland Mine arising from the construction of the railroad spur to that mine, increased rail traffic, and increased vehicle traffic. These impacts caused changes in the lifestyles of the local residents, and many have not been compensated by Westmoreland, the Tribe, or the United States.

85. There are timing and jurisdictional mismatches of revenues and demands resulting from the Westmoreland Mine. For example, Treasure County has experienced impacts from the Westmoreland Mine to its county roads, law enforcement, and other programs which have not been offset by property or gross proceeds taxes from the Westmoreland Mine.

86. The responsibilities to respond to effects of the Westmoreland Mine to date have fallen upon the state and county governments and not upon the Crow Reservation or Crow Tribe.

Leasing of Tribally-Owned Coal—The 1938 Act

87. The development of minerals held by the United States in trust for the Crow Tribe on the ceded strip, at least after 1968, has been subject to the provisions of the 1938 Indian Mineral Leasing Act (1938 Act), 25 U.S.C. § 396a-396g.

88. The leasing activity with regard to coal located in the ceded area, including the lease issued to Westmoreland for Tract III, has taken place under the 1938 Act and the regulations promulgated under that Act, 25 C.F.R. § 211.1-.30 (1983).

89. Crow coal can now also be developed pursuant to the Indian Mineral Development Act of 1982, 25 U.S.C.

§ 2101, et seq. The only actual development of Crow-owned coal, however, has taken place under the authority of the 1938 Act.

90. Westmoreland's lease was issued under the 1938 Act.

The Need for Revenues on the Crow Reservation

91. Evidence presented at trial showed that there are enormous unmet needs on the Crow Indian Reservation for additional revenues to fund essential governmental programs and services for the Crow people in the areas of housing, health, employment, land acquisition, law enforcement, welfare, and education. While some of the witnesses whose testimony concerned the needs of the Crow people sought amounts of funding that might be difficult to attain even in prosperous areas, all of the witnesses identified basic needs in their specialty areas that the Crow Tribe, even with federal and state assistance, is unable to provide due to insufficient revenues.

92. Revenues gained from the development of tribally-owned coal reserves, through taxation, royalty collection, or by any other legally-sanctioned means, could significantly assist the Tribe in developing a more effective tribal government and a stronger economic base.

Montana's Coal Taxes

93. In 1975, Montana enacted statutes that impose on coal mine operators a severance tax on each ton of coal produced in the state and a gross proceeds tax on the sale of each ton of coal produced in the state. Mont.

Code Ann. §§ 15-35-101 to 111 (1983) and §§ 15-23-701 to 704 (1983).

94. The Montana Coal Severance Tax, Mont. Code Ann. § 15-35-103, is "imposed on each ton of coal produced in the State." "Produced" means "severed from the earth." Mont. Code Ann. § 15-35-102. The tax is measured by the value of the "contract sales price" of the coal which is defined as "the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes paid on production . . . ." Mont. Code Ann. §§ 15-35-102. The statutory rate of tax varies from 3 to 30% of the value of the coal, depending upon the heating quality of the coal and the method by which it is mined. Mont. Code Ann. § 15-35-103.

95. Montana's coal taxes are paid quarterly by the producers, Mont. Code Ann. § 15-35-104, who then pass them forward to their utility company customers according to the terms of their coal contracts.

96. Montana has made provision for the disposition of funds gained through the coal severance tax. Mont. Code Ann. § 15-35-108. The major recipient is a permanent trust fund which was approved as a constitutional amendment by referendum. Mont. Const. Art. IX § 5. The purpose of the constitutional trust fund is to address environmental and socioeconomic impacts which may arise in the future and which may be consequences of the cessation of large-scale coal mining in Montana. The trust fund contains only moneys collected pursuant to the coal severance tax. The principle of the fund may only be invaded on a three-fourths vote of the Montana Legislature. The

Legislature may, however, appropriate the interest income earned by the fund. Approximately 25% of the coal severance tax moneys collected between July 1, 1977, and December 31, 1979, were allocated to the trust fund; 50% of the collections after that date go into the fund.

97. The remaining severance tax moneys are allocated to a variety of uses. The two largest uses are a "local impact and education trust fund account," which has received between 18 and 28% of the severance tax revenues and the state's general fund, which has received between 19 and 40% of severance tax revenues. The remaining revenues have gone to state equalization aid to public schools, a coal area highway improvement fund, archeological preservation, various cultural projects, park acquisition and management, an alternative energy research fund, the general funds of the counties where the coal is mined, county land use planning, and a sinking fund servicing renewable resources development bond accounts. Mont. Code Ann. § 15-35-108.

98. The Gross Proceeds from Coal Tax is imposed on "each person engaged in mining coal." Mont. Code Ann. § 15-35-701. Each person mining coal must file with the State Department of Revenue an annual report that must include, among other things, a statement of the number of "tons of coal extracted, treated, and sold from the mine during the taxable period" and "the gross yield or value in dollars and cents derived from the contract sales price." *Id.* The Department of Revenue transmits the valuation of the gross proceeds of the mine to the county assessor of each county in which the coal mines are located. Mont. Code Ann. § 15-23-702. The county

assessor then enters the value on the assessment role, *id.*, and transmits a tax assessment to the county treasurer, who collects the taxes due from the coal operator. Mont. Code Ann. § 15-23-703.

99. The gross proceeds tax enacted in 1975 is substantially a reenactment of the net proceeds tax on coal at substantially the same effective rate. The net proceeds tax was first enacted in 1981. The tax generates revenue for the counties, school districts, and other local taxing entities. The rate of the gross proceeds tax is set by the local taxing entities' mill rate which is dependent upon revenue needed to operate.

100. All of the benefits of governmental services resulting from Montana's coal taxes are available to all citizens, including members of the Crow Tribe.

101. Montana's coal tax allocation structure has made it possible to make grants to communities located within the boundaries of the Crow Reservation, as evidenced by a number of Coal Board grants to the communities of Lodge Grass and Wyola, provisions in the Montana coal tax law specifically identify Indian tribes as being eligible for coal board grants.

102. Impact moneys are available from the state to aid in mitigating impacts occurring on the reservation from coal mining on the ceded strip.

History of the Coal Tax and its Legislative Justification

103. Montana's coal taxes were influenced by Montana's history of boom and bust in the mineral industry,

the apparent coal boom in Montana in the early 1970's, and Montanans' desire and the Montana constitutional obligation that resource development within Montana occur without harm to the residents and environment of the state.

104. Coal tax bills were introduced in the 1973 Montana Legislature. None pased, and the legislature established an interin [sic] legislative fossil fuel study committee. The interim study committee conducted extensive studies, held public hearings, conducted extensive investigation regarding coal sales and coal taxes, and considered the short and long term impacts of coal mining. The committee reported its findings and proposed severance and gross proceeds tax legislation. After extensive debate, the legislature overwhelmingly enacted Montana's current coal taxes.

105. As stated in the April 16, 1975, "Statement to Accompany the Report of the Free Joint Conference Committees on Coal Taxation:"

> In setting the level of the tax, the conference committee looked at the needs to be met. The objectives were to (a) preserve or modestly increase the revenue going to the general fund, (b) to respond to current social impacts attributable to coal development, and (c) to invest in the future, when new technologies reduce our dependence on coal and mining activity may decline. The conference concluded that a severance tax of 20% on low grade lignite and 30% on other coal, plus a gross proceeds tax running at around 4-5% on all coal, was necessary and equitable.

Id. at 1.

106. The Montana Legislature was aware of the potential impacts and costs of mining when debating Montana's coal severance and gross proceeds taxes. The legis-

lature believed that other environmental laws would not prevent or remedy all impacts and costs of coal mining and that a tax on coal operators was therefore necessary. Legislators supporting the coal severance and gross proceeds taxes were determined to have coal development pay its own way.

107. Because demands for services can occur both before mining operations begin and after they cease, the legislature took the position that reasonable and prudent response to large scale coal development required the establishment of a taxing and administrative structure that (1) collected adequate resources to cover current and future costs, (2) compensated the state and local jurisdictions for assuming the risk associated with these responsibilities, and (3) is flexible enough to address the issues of jurisdictional and temporal mismatch and cumulative effects. State taxing policy required that any tax levied also have uniform application, be efficient to collect, and provide a stable revenue flow.

108. The structure of Montana's coal severance tax and the distribution of coal severance tax revenues reflects the intent of the legislature to meet the needs of Montana with respect to coal mining. The structure of the tax was designed to:

(a) Allow the severance taxes on coal production to remain a constant percentage of the price of coal;

(b) stablize the flow of tax revenue from coal mines to local governments through the property taxation system;

(c) simplify the structure of coal taxation in Montana, reducing tax overlap and improving the predictability of tax projections;

(d) accomplish the foregoing purposes by establishing categories of taxation which would recognize the unique character of coal.

Mont. Code Ann. § 15-35-101(2) (1983). The severance tax rates imposed were derived by the coal tax oversight committee based on its best estimate of the short and long-term costs to the state from coal mining.

109. Montana's coal taxes were not designed to prohibit coal development, but were designed to promote orderly development which would protect the environment and the interests of Montanans and to make coal development pay its fair share. A proposed moratorium on coal development in the 1974 Montana Legislature was defeated.

110. Montana's coal taxes were not designed to capture maximum economic rents or excess profits. The Montana Legislature recognized that coal development would place a variety of demands on state and local government and would benefit from the trained work force and organized society that resulted from state and local government activities. The legislature also recognized that large scale coal development imposed a risk of environmental impact on state and local governments, on surface owners, and on all residents of the state.

111. Montana's coal severance tax was designed to address some of the major problems associated with coal development. Tax revenues were intended to provide front end financing to communities and agencies faced with rapid increases in demands for various services. Severance tax revenues are and will continue to be used to remedy problems created by jurisdictional mismatches. Severance tax revenues are also set aside for the future and will be used

to respond to problems, both foreseen and unforeseen, that will arise when coal mining operations cease.

112. The Montana Legislature and the interim coal committee have the Montana severance and gross proceeds taxes under continuous review, and all citizens and coal companies are given periodic opportunities to express their views on the appropriateness of the Montana coal taxes.

The Crow Tribe's Coal Severance Tax

113. On January 31, 1976, the Crow Tribe enacted its own coal severance tax code to tax coal mined on the reservation at a statutory rate of 25%.

114. In July 1982, the Tribe enacted a new code providing for taxation on the ceded strip. The 1982 severance tax code has not been approved by the Secretary of the Interior for enforcement on the ceded strip. The Secretary has withheld approval because the Tribe lacks the power under its constitution to levy a tax off its reservation and because the Secretary has not determined whether such power exists as a matter of federal law.

115. Any tribal tax revenue is subject to future allocation. The Tribe's tax is a general revenue tax, and the Tribe makes no claim that it would be used to offset reservation or ceded strip impacts resulting from coal mining. The Tribe has no statutory provision to allocate coal development funds to mitigate impacts or provide coal mining-related services on the ceded strip.

116. Presently, about 60% of the revenue obtained by the Crow Tribe from coal development goes to per capita distribution to tribal members.

117. Because there has been no actual mining of coal by lessees on the reservation, no revenues have been collected under the Tribe's severance tax code. The Tribe's severance tax is not applicable presently to coal produced at Westmoreland's Absaloka Mine on the ceded strip.

118. In September 1982, Westmoreland and the Crow Tribe entered into an agreement under which Westmoreland agreed to pay to the Tribe "a tax" equivalent in amount to Montana's taxes, and the Tribe agreed to give Westmoreland credit for any severance and gross proceeds taxes that Westmoreland is required to pay to the State of Montana or its political subdivisions.

119. The arrangement under which Westmoreland agreed to pay the Tribe this "tax" was proposed by the Tribe's counsel and appears to have been motivated largely by the Tribe's desire to improve its position in this litigation.

120. The payments under this arrangement were denominated a tax to allow the producers to pass them forward to their utility customers under their coal contracts.

Application of Coal Taxes to
the Westmoreland Mine.

121. Westmoreland Resources has been paying Montana's severance and gross proceeds taxes since 1975 pursuant to Mont. Code Ann. §§ 15-35-102 and 103. At year end 1982, Westmoreland had paid approximately $53,800,000 in severance taxes and approximately $8,100,000 in gross proceeds taxes.

122. Westmoreland has not paid any coal taxes to the Crow Tribe.

Effect of Montana's Coal Taxes on the Tribe's Royalty Interest on Ceded Strip Coal

123. There is no convincing evidence that the state's taxes affect the Crow Tribe's ability to obtain a reasonable royalty from Westmoreland.

124. The Tribe's first lease agreement with Westmoreland provided for a royalty of 17¼¢ per ton plus other benefits. Further negotiations in 1974 led to a lease amendment increasing the royalty payment to the Tribe to 35¢ per ton, or 6% f.o.b. mine price, whichever is greater. The 1974 agreement between the Tribe and Westmoreland also increases the royalty on future contracts to 40¢ or 8%, whichever is greater.

125. Under the 1974 agreement between the Tribe and Westmoreland, Westmoreland has agreed to renegotiate its royalty payments to the Tribe every ten years. The agreement provides that the renegotiated royalties will be set at or near the prevailing market rate.

126. The royalty payments which the Crow Tribe has negotiated from Westmoreland were recognized at the time as being among the highest anywhere, and the Tribe presented no evidence of any higher royalties being paid to any other Indian coal owner.

127. While the royalty percentage of the Tribe has increased since 1975, the percentage rate of the Montana severance tax has stayed the same, and there have in fact been adjustments to Montana's tax which reduce the ef-

fective rate of the tax, which, in turn, will reduce the disparity of total income received by the tribe and the State of Montana.

128. The Tribe received approximately $17,877,126 in royalties from Westmoreland through October 1983. In addition to royalties, the Tribe has received other benefits from Westmoreland. For example, the Crow Tribe has an employment preference provision in its agreement with Westmoreland which results in additional money and benefits to the Tribe.

Effect of Montana's Coal Taxes on the Marketability of Ceded Strip Coal

129. There is no convincing evidence in the record that the gross proceeds tax has prevented or impeded the marketing of the Tribe's ceded strip coal. There was also no testimony that any past or present negotiations to market Crow coal have focused on the gross proceeds tax as a marketing factor.

130. There are numerous factors which affect the marketability of Montana coal, and more specifically, the Tribe's marketing of its ceded strip coal. Although the cumulative effect of coal taxes is one of these factors, the evidence at trial showed that the tax rate, at least at present, is overshadowed by other factors.

131. During a period from 1965 to 1983, the uncertainties created by the Crow Tribe's failure to adhere to agreements or establish clear policies, procedures, and directives, regarding development of their coal became significant factors in the development or lack of development of tribally-owned coal.

132. In the early to mid-1970's, with the adoption of clean air legislation, projections of increased electrical demand, and the Arab oil embargo, there was a boom in the demand for western coal. The coal market since the mid-1970's has softened, and there is now little or no demand for additional coal. Many coal companies in several states presently have excess production capacity and have found it increasingly difficult to market coal.

133. The characteristics of coal from a particular mine are important to a utility when a decision is being made to purchase coal. The ash, chemical characteristics, and physical properties, such as moisture, BTU value, and contamination, are important considerations for existing coal-burning plants. The plants' characteristics also affect a utility's decision to purchase. For new coal-burning plants, these factors, along with delivered cost, possibility of future cost increases, environmental considerations, reliability of source, production capacity, reserves, and alternative sources influence the utilities' purchasing decisions.

134. Transportation costs are a major factor in the marketability of coal. It is generally acknowledged that the "delivered price" of coal is the critical economic factor in any purchaser's decision. A major component of the delivered price is the rail or transportation costs. Montana's coal taxes are a relatively small percentage of delivered price. Transportation costs and distances are the major factor in determining the logical marketing area for a mine's coal production. The railroads are in a position to significantly influence the marketing of a particular coal.

135. Montana's logical coal marketing area, which includes the upper midwest and the Pacific northwest, has

experience [sic] less demand for coal since 1975 than Wyoming's logical market for coal, which is the south and southwest. Demand for coal in Montana's primary market in the midwest has been relatively soft because the demand for electricity and additional coal by utilities in the midwest has declined since the mid-1970's compared to the demand for electricity and additional coal in the south and southwest.

136. While the delivered price of coal is a critical economic factor in a purchaser's coal-sourcing decision, there are other non-economic factors which sometimes require a utility to purchase a higher-priced coal. For example, there are utilities in the midwest which have purchased coal from Wyoming which will have significantly higher delivered price than purchase of Montana coal because these utilities require the better quality of Wyoming coal for environmental reasons.

137. There is no evidence that Westmoreland has lost or will lose any particular coal contract because of Montana's coal taxes. In spite of the relatively low BTU quality of Westmoreland's coal and the high moisture content generally present in Montana coal, a Westmoreland representative expressed guarded optimism that Westmoreland could effectively compete for contracts to supply coal to three plants scheduled to be on line in the next few years. Westmoreland has a significant transportation advantage with respect to these three plants.

138. The continued competitiveness of Montana coal is also demonstrated by the fact that there have been new mines opened in Montana since the severance tax was enacted in 1975, and there have been new applications filed with the Montana Department of State Lands by other coal

companies expressing a desire to open new mines in Montana. Further, Montana companies have had new contract sales since the adoption of Montana's coal taxes in 1975.

139. Based on the 1982 agreement between the Crow Tribe and Westmoreland, if the Crow Tribe prevails in this lawsuit the Tribe would receive a payment equal to the amount Westmoreland is presently required to pay to the State of Montana. Based on this agreement, there would be no change in the effect, if any, of the taxes on the marketability of ceded strip coal. The Court does recognize, however, that the Crow Tribe-Westmoreland agreement may be changed by further negotiation.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of this matter under 28 U.S.C. §§ 1331, 1345, and 1362. Venue is established under 28 U.S.C. § 1391(b).

II.

It is inappropriate at this time to declare the rights of the parties respecting the validity of Montana's coal taxes assessed on coal produced within the external boundaries of the Crow Indian Reservation. Although the matter was considered on a motion to dismiss by both this Court and the United States Court of Appeals for the Ninth Circuit, the evidence adduced at trial indicates that there is no "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil*, 312 U.S. 270, 273 (1941).

The decision to issue declaratory relief rests in the sound discretion of the trial court. *See Provident Tradesmen's Bank & Trust v. Patterson,* 390 U.S. 102, 126 (1968). The Court is reluctant to declare whether or not the state's coal tax statutes are valid on the reservation because: (a) no severance or gross proceeds tax has been assessed or collected on the Crow Indian Reservation; (b) there is no surface coal mine on the reservation which produces coal arguably subject to the state's coal taxes; (c) although coal mining agreements have been reached between the Tribe and non-Indian lessees, the lessees have not entered into long-term coal contracts, and, because of a slumping coal market, the mines contemplated by the agreements may not come to fruition; (d) the record lacks detail with respect to surface coal mining on the reservation; and (e) the State should have an opportunity to reassess its position with regard to taxation of on-reservation coal after final resolution of the validity of the state's taxes on tribally-owned coal on the ceded strip.

III.

Title to undisposed-of minerals underlying the ceded strip is held in trust by the United States for the Crow Indian Tribe.

(a) The second treaty of Fort Laramie, 1868, which set apart the 8 million acre Crow Reservation for undisturbed use and occupation of the Crow Tribe vested all beneficial property interests in the Tribe, including the rights to the underlying minerals. *United States v. Shoshone Tribe,* 303 U.S. 111, 117-118 (1938).

(b) Under the 1904 Cession Act, the Tribe gave up all right, title and interest to the ceded strip, but until the

lands covered by the Act were actually disposed of, the Crow Tribe retained a beneficial interest in them. The United States acted as trustee for the Tribe with respect to disposal of lands and payment of sale proceeds. *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920); Act of April 27, 1904, 33 Stat. 352.

(c) When lands were disposed of under some of the homestead laws, *e.g.*, Act of February 27, 1917, 39 Stat. 944, only the surface estates were granted. The mineral estates were reserved to the United States, and the Tribe retained the beneficial interest in the minerals that were reserved. *See Ash Sheep Co. v. United States, supra.*

(d) The 1958 Act restoring undisposed of lands to the Crow Tribe expressly states that "all lands now or hereafter classified as vacant and undisposed-of ceded lands . . . are hereby restored to tribal ownership." The vacant and undisposed of minerals underlying the ceded strip fall within this description and are embraced by this provision of the 1958 Act. Act of May 19, 1958, Pub. L. No. 85-420, 72 Stat. 121.

(e) In spite of the language designating approximate surface acreage to be restored on named reservations, the 1958 Act restored the minerals in the ceded strip to Crow tribal ownership. Act of May 19, 1985, 72 Stat. 121; *Cf.* Solicitor's Opinion M-34836, 59 I.D. 393 (1947; Solicitor's Opinion A-25219, 60 I.D. 174 (1948). The approximate acreage figure of 10,260.95 acres listed for the Crow Reservation creates an ambiguity on the face of the statute which can only be resolved by resort to legislative history. *See DeCoteau v. District Court*, 420 U.S. 425, 447 (1975). The legislative history supports the conclusion that the 1958

Act restored the ceded strip minerals to the Crow Tribe. The two major related purposes of the 1958 Act, as revealed by its legislative history, were to accord equal treatment to the tribes that did not accept the IRA and to restore to tribal ownership all of the surface lands and minerals interests that had been temporarily withdrawn following the enactment of the IRA. *See supra* Findings of Fact 21-22. If the ceded strip minerals in which the Crow Tribe retains a beneficial interest were not restored to full tribal ownership by the 1958 Act, the Crow Tribe would not receive the same treatment as the tribes whose lands and minerals were restored under § 3 of the IRA, 25 U.S.C. § 463. *See* 60 I.D. 174 (1948); 59 I.D. 393 (1947). Similarly, excluding the Tribe's ceded strip minerals from the coverage of the 1958 Act would conflict with that Act's express purpose of fully restoring to tribal ownership all of the surface lands and minerals that had temporarily withdrawn in 1934.

(f) Courts must interpret statutes in a manner that will promote, not defeat, the purposes that Congress sought to achieve. *See Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 118 (1983; *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 607-08 (1979). Applying that principle of statutory construction to the 1958 Act inescapably leads to the conclusion that the "vacant and undisposed-of ceded lands" restored to the full beneficial ownership of the Crow Tribe include the previously undisposed-of mineral interests in the ceded strip in which the Tribe retained a beneficial interest.

(g) The undisposed-of ceded minerals underlying entered land were not added to and made a part of the Crow

Reservation by the 1958 Act. The term "reservation status" has little significance in describing a tribally-owned mineral estate which lies outside the surface boundaries of a tribe's reservation. The 1958 Act's legislative history provides no support for the anomalous proposition that Congress extended governmental powers and attributes of a tribe's inherent sovereignty to the subsurface estate in an area outside the boundaries of a diminished reservation where the surface is held predominently by non-Indians.

IV.

There exists no express authorization for the imposition of Montana's coal severance and gross proceeds taxes on the mining of coal held by the United States in trust for the Crow Tribe. The Supreme Court recently held that state authorization under the 1924 Indian Mineral Leasing Act, 25 U.S.C. § 398, to tax mineral production does not extend to leases issued pursuant to the 1938 Indian Mineral Leasing Act, 25 U.S.C. § 396a-396g. *Montana v. Blackfeet Tribe of Indians*, 105 S.Ct. 2399 (1985).

V.

The Court of Appeals recognized that mining of coal on the ceded strip created a "further complexity" in analyzing the validity of Montana's coal taxes. *Crow Tribe of Indians v. State of Montana*, 650 F.2d at 1114. Because this case was before the Circuit on a motion to dismiss, the factual record was insufficient to allow the court to analyze fully the distinctions between state taxation on the ceded strip and state taxation on the reservation. This Court

notes that the predominant focus of the Ninth Circuit's opinion is on the larger question of state taxation on the reservation. Insofar as this Court's conclusions depart from the Ninth Circuit's opinion, the Court believes them to be justified by the full factual record and by the jurisdictional vagaries applicable to the ceded strip which were elucidated at trial.

VI.

Montana's coal taxes imposed on the production by a non-Indian mining company of coal held by the United States in trust for the Crow Indian Tribe outside the boundaries of the Crow Reservation are not preempted by federal law.

(a) An exercise of state jurisdiction is preempted when it directly conflicts with a federal enactment, *see, e.g., Kennerly v. District Court,* 400 U.S. 423 (1971), or when federal law or policy so pervasively governs the targeted activity that there remains no room for the additional burdens sought to be imposed by the state. *See, e.g., Warren Trading Post Co. v. Arizona Tax Commission,* 380 U.S. 685 (1965).

(b) Montana's coal taxes do not directly conflict with a congressional enactment because none exists which expressly bars the State of Montana from imposing its coal taxes on coal held by the United States in trust for the Crow Tribe. The Court finds this especially significant with respect to coal mined on the ceded strip. In *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), the Supreme Court, noting that it does not lightly imply tax emeptions, stated that tribal activities conducted outside the reserva-

tion present "different considerations" and that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-49. The state urges that any fair reading of *Jones* leads to the conclusion that state coal taxes levied on the ceded strip are not preempted since Congress has not explicitly done so. While the Court agrees that the state's argument has force, it declines the opportunity to buttress its conclusion solely on *Jones*. Further analysis of federal policy underlying the 1938 Mineral Leasing Act, analysis which the Court of Appeals held to be applicable and which appropriately takes into account the tradition of Indian sovereignty, also leads to the conclusion that the Montana coal taxes are not preempted on the ceded strip.

(c) There exists no pervasive federal law or policy governing the leasing of tribally-owned coal that ousts a state tax on production of tribally-owned coal on the ceded strip.

(d) In determining whether a state law is preempted by pervasive federal law or policy, a court must undertake "a particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . ." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). The standards of preemption applied in Indian law differ from those that have emerged in other areas of law. "The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law." *Id.* at 143.

(e) The fact that the tribally-owned ceded strip coal lies outside the boundary of the diminished reservation is an important consideration in the preemption analysis. "The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." *White Mountain Apache Tribe v. Bracker,* 448 U.S. at 151.

(f) The Court of Appeals found that the 1938 Indian Mineral Leasing Act, 25 U.S.C. § 396a-396f, and the regulations promulgated under that Act, constituted the potential preemptive federal law in this case. The Ninth Circuit identified and directed this Court's preemption inquiry to three goals that Congress sought to achieve in enacting the 1938 Act:

> First, the Act sought to achieve uniformity in the law governing mineral leases on Indian lands . . . . Second, the 1938 Act was designed to help achieve the broad policy of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), that tribal governments be revitalized . . . . Third, the 1938 Act was intended to encourage tribal economic development. . . .

Crow Tribe of Indians v. State of Montana, 650 F.2d at 1112-13; *see Montana v. Blackfeet Tribe of Indians,* 105 S.Ct. at 2404 n. 5. The Tribe's arguments and evidence attempt to prove that the latter two goals are frustrated by the imposition of Montana's coal tax.

(g) State taxation of Crow coal on the ceded strip does not hinder the revitalization of Crow tribal govern-

ment. The Court of Appeals determined that in the mineral leasing context, revitalization entailed increasing of tribal government's control over decisions to lease tribal lands and over conditions to be placed on leases. Evidence at trial did not show that the Montana taxes either deprived the Tribe of control in leasing its ceded strip coal or significantly affect the rate of development of coal mining on the ceded strip. Any deterrent in the marketing of tribally-owned ceded strip coal caused by the severance and gross proceeds taxes is overshadowed by the present marketing difficulties common to all Montana coal due to a decreased market for coal in markets traditionally served by Montana coal. Coal owned by the Crow Tribe has been further disadvantaged in the marketplace by the Tribe's inability to put a marketing program in place.

(h) Discouragement, if any, of tribal economic development caused by state taxation of tribally-owned coal on the ceded strip can be justified by the state's legitimate interests in raising revenue to offset the cost of services it provides on the ceded strip, to mitigate short and long-term impacts of mining, and to perpetuate the mineral wealth subject to its general civil jurisdiction. Contrary to the Tribe's assertion, the Ninth Circuit's opinion remanding this case does not require, at least with respect to ceded strip coal, that the state establish a mathematical equilibrium between the quantifiable costs of coal development and the revenue raised by its taxes to avoid a finding that the state's taxes are preempted by federal law. Instead, the Ninth Circuit recognized that a state's legitimate interests also include such unquantifiable interests as the value of a trained workforce, an organized government and system of laws, as well as the unquantifiable burden of

future socio-economic and environmental impacts resulting from coal mining. *Crow Tribe,* 650 F.2d at 1114. The ceded strip lies within the general civil jurisdiction of the State of Montana and outside the civil jurisdiction of the Crow Tribe. The state legislature has articulated legitimate and exceedingly strong regulatory interests and responsibilities and has imposed its coal taxes accordingly. *Cf. White Mountain Apache Tribe,* 448 U.S. at 150. *Ramah Navaho School Board v. Bureau of Revenue,* 458 U.S. 832, 845 (1982). The state's coal taxes do not impair the Crow Tribe's ability to obtain reasonable royalty rates when tribally-owned coal is leased.

(i) Montana's coal taxes are not in conflict with tribal taxation in the ceded area. The Tribe's tax ordinances have not been approved by the Secretary of the Interior for application to off-reservation mining because the Tribe lacks power under its own constitution to tax outside the reservation boundaries. The Court notes that in 1983 the Secretary withheld approval for the Hopi severance tax in part on the ground that due process does not permit a tribe to tax an activity with which it has no governmental nexus. *See* Exhibit D-417. A challenge that the Hopi Tribe was not empowered by its constitution to impose an off-reservation severance tax on its coal was raised but not addressed in the opinion.

VII.

Montana's severance and gross proceeds taxes levied on the production of tribally-owned coal on the ceded strip do not infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee,* 358 U.S. 217, 220 (1959).

(a) This "self-government test" is related to the preemption analysis insofar as federal law and policy encourage tribal self-sufficiency and economic development, but the right of tribal self-government serves as an independent barrier to the intrusive assertion of state regulatory authority over tribal reservations and members. *White Mountain Apache Tribe*, 448 U.S. at 142-43.

(b) In *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980), the Supreme Court described the important considerations when the self-government test is applied to resolve a conflict between a state and an Indian tribe.

> The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government on one hand, and those of the State on the other. While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated *on the reservation* by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in rasing revenues, and that interest is likewise strongest when the tax is *directed at off-reservation value* and when the taxpayer is the recipient of state services.

Id. at 156-57 (citation omitted, emphasis added).

(c) *Washington v. Confederated Tribes of Colville* illustrates that the reservation boundary is a significant factor in balancing the interests of the state against those of the federal government and tribe. The self-government

analysis has little applicability to cases such as this where the state seeks to tax a non-Indian company for activities engaged in outside the reservation because, while tribes do retain "attributes of sovereignty over both their members and their territory," *United States v. Mazurie,* 419 U.S. 544, 547 (1975), a tribe's governmental powers which arise from its retained sovereignty do not extend beyond the reservation boundaries. In 1904 the Crow Tribe relinquished its inherent authority to regulate or tax on the ceded strip and there has been no showing here that such power has been expressly returned to the Tribe by the United States. The relationship between Westmoreland Resources, Inc., and the Crow Tribe is purely contractual. Outside the reservation boundaries, on the ceded strip, this relationship carries with it no consent by Westmoreland to submit to the retained civil jurisdiction of the Crow Tribe. *Cf. Montana v. United States,* 450 U.S. 544, 565-66 (1981). Thus, on the ceded strip, the Tribe's interest in raising revenues is weak because the Tribe lacks governmental power and other sovereign interests which require accommodation with state interests under the self-government analysis.

(d) In any event, the self-government analysis leads to the conclusion that the state's taxes on the production of tribally-owned coal on the ceded strip are valid. A mere interest in raising revenues, even though the Tribe is in dire need of revenues to provide needed services on the reservation and to strengthen its economic base, does not in and of itself invalidate the state tax. There must be some contact between the Tribe's governmental power and the activities sought to be taxed. The Crow Tribe lacks such a connection with the off-reservation mining of its

coal. The Tribe does not provide services on the ceded strip nor is it responsible for the impacts traceable to coal mining on the ceded strip. The evidence shows that the impacts of mining and the responsibilities for provision of services predominantly fall off the reservation and onto the state and local governments. With respect to ceded strip coal, the Tribe is not seeking increased revenues from a value which is generated on the reservation. The Tribe's interest in its off-reservation coal is an ownership interest which is not substantially different than the interest held by any other coal lessor. The evidence shows that this ownership interest, the royalty interest, has not been impaired by the imposition of the state's coal taxes.

VIII.

The Court concludes that the Tribe and its lessees cannot create a tax on coal produced on the ceded strip by agreement. The 1982 lease agreement between the Tribe and Westmoreland contains a clause under which Westmoreland agreed to pay the Tribe a "tax" equal to the amount due under Montana's severance and gross proceeds tax laws with a credit for amounts actually paid to the state and local governments. Payment under this arrangement, which is collectible only because payor has consented, is simply not a tax. *See In re Lorber Industries,* 675 F.2d 1062, 1066 (9th Cir. 1982).

IX.

Montana's taxes have not been shown to constitute an impermissible "multiple burden" on interstate commerce. In *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130

(1982), the Supreme Court noted that an impermissible burden on interstate commerce could arise if both the state and tribe taxed the same mining activity or if one or both taxed the activity at a greater rate than their contact with the activity would justify. *Id.* at 158 n. 26. The Crow Tribe is not authorized to tax the production of coal on the ceded strip. Thus, the ceded strip is within the state's and not the Tribe's taxing jurisdiction. Therefore, the Court need not reach this interstate commerce issue with respect to the ceded strip as there can be no multiple tax burden.

X.

The Tribe has also raised a claim that Montana's coal taxes on tribally-owned coal are invalid under the Indian Commerce Clause of the Constitution, Art. I, Sec. 8, Cl. 3. The Tribe claims that the taxes are invalid because they are not authorized by Congress or, at the least, they constitute an undue burden on Indian commerce. As the Tribe recognizes, however, the Supreme Court has found it unnecessary to modify the preemption analysis "to hold that on-reservation activities involving a resident tribe are presumptively beyond the reach of state law even in the absence of comprehensive federal regulation . . . ." *Ramah Navaho School Board, Inc. v. Bureau of Revenue of New Mexico,* 458 U.S. 832, 845 (1982). Therefore, the dormant Indian commerce clause cannot be used by the courts as an analytical avenue to the merits of cases such as that before this Court in addition to, or in lieu of, the preemption analysis absent a change in position by the Supreme Court.

XI.

This Court's finding that there is presently no approved tribal tax on the ceded strip negates the Tribe's contention that Montana must provide a credit against its taxes in the amount of analogous tribal taxes. The Court, therefore, need not entertain the merits of that claim.

XII.

Montana's coal taxes are not impermissible taxes on tribal trust property. The Tribe argues that because the taxes are in essence taxes on real property, the taxes must be viewed as being imposed ratably on both the producer's share and the royalty share. Consequently, the Tribe contends that the state cannot impose that portion of the tax attributable to the Tribe's royalty share. The Court concludes that Montana's taxes are not taxes on tribal trust property. Both the Montana Supreme Court and the Court of Appeals have held that the legal incidence of the coal taxes falls on the producer. *See Commonwealth Edison v. Montana,* — Mont. —, 615 P.2d 847, 850 (1980), *affirmed* 453 U.S. 609 (1981); *Crow Tribe,* 650 F.2d at 1110. The Court of Appeals has noted, however, that it did not specifically address the question of where the tax incidence on the Tribe's royalty interest lies. *See Crow Tribe,* 665 F.2d at 1390 (1982). The severance tax statute clearly requires the "coal mine operator" to file the tax return and pay the severance tax. Mont. Code Ann. § 15-35-104 (1983). There is no requirement that the mine operator pass the tax back to the royalty owner. Similarly, the producer must pay the gross proceeds tax and there is no re-

quirement that the tax be assessed against the royalty interest. *See* Mont. Code Ann. §§ 15-23-701 to 704 (1983). The producer, not the holder of the royalty interest, is subject to the imposition of liens upon the coal mine and the producer's personal property should the taxes not be paid. *See* Mont. Code Ann. § 15-23-704 (1983). The evidence at trial shows that coal mine operators pass Montana's coal taxes forward to the consumer. Thus, Montana's coal taxes are not levied on tribal property. The royalty interest is merely a component of the f.o.b. price on which the taxes directed at the producer are calculated.

XIII.

For the foregoing reasons, the Court concludes that the Montana Coal Severance Tax and the Montana Gross Proceeds from Coal Tax are valid insofar as they are applied to the production of coal held by the United States in trust for the Crow Tribe on the ceded strip.

An appropriate order shall issue in accordance with these Findings of Fact and Conclusions of Law.

Done and dated this 10th day of September, 1985.

/s/ James F. Battin
Chief Judge

3. District Court Order Directing Entry of Judgment Filed September 10, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, et al., Plaintiffs, -vs- UNITED STATES OF AMERICA, et al., Plaintiff-Intervenor, -vs- STATE OF MONTANA: ELLEN FEVER, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; YELLOWSTONE COUNTY, Montana; TREASURE COUNTY, Montana; LORRAINE HAMILTON, Treasurer, Big Horn County, Montana; MAY JENKINS, Treasurer, Yellowstone County, Montana, CLARIBEL BONINE, Treasurer, Treasure County, Montana, Defendants. WESTMORELAND RESOURCES, INC., Defendant-Intervenor.	CV-78-100-BLG ORDER

Pursuant to the Findings of Fact and Conclusions of Law issued this day in the above-captioned case,

The Clerk is directed to enter judgment in favor of defendant State of Montana and against plaintiff Crow Tribe of Indians and plaintiff-intervenor United States declaring that the Montana Coal Severance Tax, Mont. Code Ann. §§ 15-35-101 to 111 (1983), and the Montana Gross Proceeds from Coal Tax, Mont. Code Ann. §§ 15-23-701 to 704 (1983), are valid insofar as they are levied against the production of coal held by the United States in trust for the Crow Tribe on the ceded strip which was created by the Cession Act of April 27, 1904, 33 Stat. 352, and which lies outside the boundaries of the Crow Indian Reservation.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 10th day of September, 1985.

/s/ James F. Battin
Chief Judge

4. District Court Judgment Filed September 11, 1985

JUDGMENT IN A CIVIL CASE

Filed, Entered and Noted in Civil Docket

September 11, 1985

United States District Court District Montana

Case, Title

The Crow Tribe of Indians, et al

v.

USA, Plaintiff-Intervenor,

v.

The State of Montana et al.

Docket Number CV-78-110-BLG

Name of Judge or Magistrate

James F. Battin

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the Clerk is directed to enter judgment in favor of Defendant State of Montana and against Plaintiff crow Tribe of Indians & Plaintiff Intervenor United States, declaring that the Montana coal Severance Tax, MCA §§ 15-35-101 to 111 (1983), and the Montana Gross Proceeds from Coal Tax, MCA §§ 15-23-701 to 704 (1083), are valid insofar as they are levied against the production of coal held by the

United States in trust for the Crow Tribe on the ceded strip which was created by the cession Act of April 27, 1904, 33 Stat. 352, and which lies outside the boundaries of the Crow Indian Reservation.

Clerk	Date
LOU ALEKSICH, JR.	9-11-85

(By) Deputy Clerk

KATHRYN L. WOODWARD

5. Opinion of Court of Appeals Filed July 13, 1981

CROW TRIBE OF INDIANS,

Plaintiff-Appellant,

v.

STATE OF MONTANA, and Ramon Dore,
Director, Montana Department of Revenue,

Defendants-Appellees.

No. 79-4321

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 14, 1980.

Decided July 13, 1981.

Appeal From The United States District
Court For The District Of Montana

Before TANG, FLETCHER and ALARCON, Circuit Judges.

FLETCHER, Circuit Judge:

In 1975, Montana imposed severance and gross proceeds taxes on all coal mined and sold in Montana, including coal mined by non-Indians from the Crow Indian Reservation and from deposits held in trust for the Crow Tribe of Indians (Tribe). The Tribe sought injunctive and declaratory relief against the imposition of taxes on the production of non-Indian mineral lessees. The district court 469 F.Supp. 154 dismissed the complaint under Fed.R. Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted, and the Tribe now appeals. Our jurisdiction is based on 28 U.S.C. § 1291.

We hold that even though the incidence of these taxes falls upon non-Indian lessees, the Tribe has alleged facts that, if proved, would establish that the taxes are preempted by the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1976), and that the taxes infringe upon the Tribe's right to govern itself. Accordingly, we reverse and remand.

I

Vast deposits of coal underlie both the Crow Reservation proper and an adjacent area known as the "ceded strip." The ceded strip consists of about 1,137,500 acres that were originally part of the reservation. The Crow Tribe ceded its interest in the surface estate of the area to the United States in 1904 in order to open the area to non-Indian entry and settlement, pursuant to the Act of April 27, 1904, ch. 1624, 33 Stat. 352. Although surface interests were thereafter conveyed to non-Indians, *see Cady v. Morton*, 527 F.2d 786, 789 (9th Cir. 1975), rights to minerals underlying the ceded strip were in large part retained by the United States for the benefit of the Tribe. We held recently that the ceded area is not a part of the reservation. *Little Light v. Crist*, — F.2d — at —, No. 79-2714, slip op. at 408 (9th Cir. 1981). Regardless of the status of the ceded strip, however, the underlying minerals are held by the United States Government in trust for the Tribe.

Since 1967, the Secretary of the Interior has actively encouraged the Tribe to develop its coal resources through the granting of prospecting permits and mining leases. The leasing activity has taken place under the aegis of the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1976), and the regulations promulgated under the Act, 25 C.F.R. §§ 171.-1-.30 (1980).

In 1972, Westmoreland Resources, a non-Indian company entered into two mining leases with the Crow Tribe that embraced coal underlying about 31,000 acres of the ceded strip. The Tribe has also granted prospecting permits to and entered into leases with other non-Indian companies. To date, only Westmoreland Resources has actually mined coal under the leases.

In 1975, Montana enacted statutes that impose on coal mine operators a severance tax on each ton of coal produced in the state and a gross proceeds tax on the sale of each ton of coal produced in the state. 4 Mont. Code Ann. §§ 15-35-101 through 15-35-111 and §§ 15-23-701 through 15-23-704 (1979) (formerly Mont. Rev. Code Ann. §§ 84-1312 through 84-1325 (1947)). Westmoreland Resources has been paying Montana's severance and gross proceeds taxes since 1975. Because Westmoreland Resources falls into the highest statutory classification, that of one who surface mines high-quality coal, it is required to pay a severance tax equal to 30 percent of the value of the coal mined. Since 1975, Westmoreland has paid $27 million in severance taxes and $3 million in gross proceeds taxes. During the same period, Westmoreland has paid about $8 million in royalties to the Tribe under the terms of its leases.

On January 31, 1976, the Tribe enacted its own coal tax code which provides for a severance tax of 25 percent of the value of coal mined by the Tribe's lessees. At present, the tribal severance tax applies only to coal mined on the reservation, and not to coal mined on the ceded strip.[1]

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[1]See note 19 *infra*.

II

The Montana Coal Severance Tax, Mont. Code Ann. §§ 15-35-103, is "imposed on each ton of coal produced in the state." "Produced" means "severed from the earth." Mont. Code Ann. § 15-35-102. The tax is measured by the value of the "contract sales price" of the coal, which is defined as "the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes on production." *Id.* The rate of tax varies from 3 to 30 percent of the value of the coal, depending upon the quality of the coal and whether the mine is a surface or an underground mine. Mont. Code Ann. § 15-35-103. The tax is paid quarterly directly to the Montana Department of Revenue by each coal mine operator. Mont. Code Ann. § 15-35-104.

Montana has made elaborate provision for the disposition of funds gained through the coal severance tax. The major recipient is a special trust fund created by the Montana Constitution. Mont. Const. art IX, § 5. The fund contains only monies collected pursuant to the severance tax. The principal of the fund may only be invaded on a three-fourths vote of the Montana legislature. The legislature may, however, appropriate the interest and income earned by the fund. Twenty-five percent of the coal severance tax monies collected prior to December 31, 1979 were to go directly to the trust fund; 50 percent of the collections after that date go into the fund.

The remaining severance tax monies are allocated to a variety of uses. The largest single use is a "local impact and education trust fund account," which is to re-

ceive between 26 and 37½ percent of revenues. The remaining revenues go to state equalization aid to public schools, a coal area highway improvement fund, archeological preservation, various cultural projects, park acquisition and management, an alternative energy research fund, the general funds of the counties where the coal is mined, county land planning, and a sinking fund servicing renewable resource development bond accounts. Mont. Code Ann. § 15-35-108.

The Gross Proceeds from Coal Tax is imposed on "each person engaged in mining coal." Mont. Code Ann. § 15-23-701. Each person mining coal must file with the State Department of Revenue an annual report that must include, *inter alia*, a statement of the number of tons of coal extracted, treated, and sold from the mine during the taxable period" and "the gross yield or value in dollars and cents derived from the contract sales price." *Id.* The Department of Revenue transmits to the county assessor of each county in which the coal mines are located the valuation of the gross proceeds of the mine. Mont. Code Ann. § 15-23-702. The county assessor then enters the value on an assessment roll, *id.*, and transmits a tax assessment to the county treasurer, who collects the taxes due from the coal operator. Mont. Code Ann. § 15-23-703.

III

The litigants ask us to make difficult determinations concerning the limits of state power to tax Indians and Indian-related activities. Although the issue before the Supreme Court in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973),

was the narrow one of whether a state may tax reservation Indians for income earned on the reservation, the Court used the occasion to describe the analytical context in which such questions are to be viewed.

The Court in *McClanahan* stated that, in recent years, "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." 411 U.S. at 172, 93 S.Ct. at 1262. The Court noted, however, that it would be a vast oversimplification to say that nothing is left of the doctrine of Indian sovereignty. *Id.* at 170, 93 S.Ct. at 1261. The doctrine remains relevant as a "backdrop against which the applicable treaties and federal statutes must be read." *Id.* at 172, 93 S.Ct. at 1262. The Court made the further observation that because the federal treaties and statutes in almost all cases do define the boundaries of federal and state jurisdiction, the extent of federal pre-emption and residual Indian sovereignty in the absence of federal legislation or treaty is essentially moot. *Id.* at 172 n.8, 93 S.Ct. at 1262 n.8. Finally, the Court in *McClanahan* stated that, if the state action is not preempted by federal legislation or treaty, the state need only satisfy the test laid down in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1958), that state action must not infringe on the rights of reservation Indians to govern themselves. *Id.* at 171-72, 93 S.Ct. at 1261-1262.

Although the Court in *McClanahan* stated that tribal immunity from state taxation does not rest primarily on any inherent tribal sovereignty, we note that remnants of the sovereignty rationale are implicit in the holding of *McClanahan* in the form of certain presumptions. Direct

state taxation of tribal property or the income of reservation Indians is presumed to be preempted, absent express Congressional authorization. *Bryan v. Itasca County,* 426 U.S. 373, 376-77, 96 S.Ct. 2102, 2105-2106, 48 L.Ed.2d 710 (1976); *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 475-81, 96 S.Ct. 1634, 1642-1645, 48 L.Ed.2d 96 (1976); *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973). In contrast, state taxation of non-Indian activities on the reservation can proceed without express congressional authorization, even if the taxation affects Indians in some way. *See Washington v. Confederated Tribes of Colville,* 447 U.S. 134, 148, 100 S.Ct. 2069, 2078, 65 L.Ed.2d 10 (1980). It is enough that such taxation does not conflict with federal statutes or treaties or interfere to an impermissible extent with the ability of the tribe to govern itself.

In *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), the Supreme Court discussed the principles of preemption to be applied in a case such as this. The Court noted that the test of whether a state law concerning Indians has been preempted is different from the test used to find federal preemption in other contexts. *Id.* at 448 U.S. at 140, 100 S.Ct. at 2582. The tradition of Indian independence from state control and the broad federal policies to the same end (the "backdrop" of Indian sovereignty described in *McClanahan*) color the way in which we view federal statutes and regulations affecting Indians. *Id.* The Court found that Congress intended broad preemptive effect to be accorded federal statutes and regulations when the state action in question threatens the "firm federal policy of

promoting tribal self-sufficiency and economic development." *Id. See generally* D. Getches, D. Rosenfelt, & C. Wilkinson, *Cases and Materials on Federal Indian Law,* 295-99 (1979). No express congressional statement of preemptive intent is required; it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation, or policy.[2] On the other hand, legitimate interests of the state must be considered, and the ultimate result where the conduct of non-Indians on the reservation is involved depends on "a particularized inquiry into the nature of the State, Federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe v. Bracker,* 448 U.S. at 149, 100 S.Ct. at 2586.

The accommodation of state and tribal interests is also central to the analysis of whether a state law infringes upon the right of reservation Indians to "make their own laws and be ruled by them." *Washington v. Confederated Tribes of Colville,* 447 U.S. 134, 156, 100 S.Ct. 2069, 2083, 65 L.Ed.2d 10 (1980) (quoting *Williams v. Lee,* 358 U.S. 217, 220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251 (1959)). The self-government doctrine differs from the preemption analysis in that it specifically prohibits state action that impairs the ability of a tribe to exercise traditional governmental functions such as zoning, *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655, 663-

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[2]Of course, state law will be preempted where Congress expressly so provides, or where the federal regulation is of such breadth that it occupies the field, leaving no room for state involvement.

64 (9th Cir. 1975), *cert. denied,* 429 U.S. 1038, 97 S.Ct. 731, 50 L.Ed.2d 748 (1977); vehicle registration, *Red Lake Band of Chippewa Indians v. Minnesota,* 311 Minn. 241, 248 N.W.2d 722 (1976), or the exercise of general civil jurisdiction over the members of the tribe, *Fisher v. District Court,* 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976); *Littell v. Nakai,* 344 F.2d 486 (9th Cir. 1965), *cert. denied,* 382 U.S. 986, 86 S.Ct. 531, 15 L.Ed.2d 474 (1966); *White v. Califano,* 581 F.2d 697 (8th Cir. 1978); *California v. Quechan Tribe,* 424 F.Supp. 969 (S.D.Cal. 1977), *vacated on other grounds,* 595 F.2d 1153 (9th Cir. 1979) (tribe's sovereign immunity barred suit); *United States ex rel. Rollingson v. Blackfeet Tribal Court,* 244 F.Supp. 474 (D. Mont. 1965). *See also Arizona ex rel. Merrill v. Turtle,* 413 F.2d 683 (9th Cir. 1969), *cert. denied,* 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970) (state has no authority to extradite Indians living on reservation). At base, however, the right of tribal self-government is a federal policy established by and subject to the will of Congress. Although self-government is related to federal preemption in the sense that both depend on congressional action and in the sense that preemption is considered in the context of the deeply ingrained traditional notions of self-government, the self-government doctrine is an independent barrier to state regulation. *See White Mountain Apache Tribe v. Bracker,* 448 U.S. at 140, 100 S.Ct. at 2582.

IV

The Tribe initially argues that the incidence of Montana's taxes is on the Tribe. The tax is invalid, the Tribe contends, because Congress has not authorized the direct

taxation of tribal mineral holdings, as required by the Supreme Court's rulings in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270 36 L.Ed.2d 114 (1973), and *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).

This court must look to the operation of the taxing statutes to determine which party the Montana legislature intended to be liable for the tax. We find that the incidence of these taxes is on the non-Indian mineral lessee. Neither of the taxes is collected from the owner of the mineral rights *in situ* (unless the owner also happens to be the producer),[3] and the tax is not required by law to be passed on to the owner or to any other party. *See American Oil Co. v. Neill*, 380 U.S. 451, 455-56, 85 S.Ct. 1130, 1133-1134, 14 L.Ed.2d 1 (1965); *First Agricultural Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 346-47, 88 S.Ct. 2173, 2177-2178, 20 L.Ed.2d 1138 (1968); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 99, 62 S.Ct. 1, 3, 86 L.Ed. 65 (1941). Nor is the Tribe subject to any reporting requirements in connection with the tax. Furthermore, we note that the Montana Supreme Court has held that the severance tax is levied on the producer, and that the taxable event is the act of severance. *Commonwealth Edison Co. v. Montana*, 615 P.2d 847, 850, 857 (Mont. 1980), *prob. juris. noted*, — U.S. —, 101 S.Ct. 607, 66 L.Ed.2d 494 (1980) (No. 80-581). The Tribe is not obli-

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[3]The Tribe has not alleged that it has mined any coal itself or that it has paid any taxes directly to the State of Montana.

gated to pay the taxes, and it cannot be held liable for deficiencies.[4]

The extent to which the economic burden of the tax is passed on to the Tribe in the form of decreased royalties is not relevant to the limited inquiry we make here to determine the legal incidence of the tax. *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 481-82, 96 S.Ct. 1634, 1645-1646, 48 L.Ed.2d 95 (1976); *Fort Mojave Tribe v. County of San Bernardino,* 543 F.2d 1253, 1255 n.2, 1256 (9th Cir. 1976), *cert. denied,* 430 U.S. 983, 97 S.Ct. 1678, 52 L.Ed.2d 377 (1977); *Agua Caliente Band of Mission Indians v. County of Riverside,* 442 F.2d 1184 (9th Cir. 1971), *cert. denied,* 405 U.S. 933, 92 S.Ct. 930, 30 L.Ed.2d 809 (1972); *Mescalero Tribe v. O'Cheskey,* 625 F.2d 967, 970 (10th Cir. 1980). *See also United States v. County of Fresno,* 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977); *Gurley v. Rhoden,* 421 U.S. 200, 204, 207, 95 S.Ct. 1605, 1608, 1610, 44 L.Ed.2d 110 (1975); *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U.S. 361, 382 n.12, 84 S.Ct. 378, 390 n.12, 11 L.Ed.2d 389 (1964); *Connecticut General Life Ins. Co. v. Johnson,* 303 U.S. 77, 80, 58 S.Ct. 436, 438, 82 L.Ed. 673 (1938); *Lash's Prods. Co. v. United States,* 278 U.S. 175, 49 S.Ct. 100, 73 L.Ed. 251 (1929).

[14] The Tribe argues that the ultimate intent of the Montana legislature was to tax the coal itself and thereby raise revenue, regulate the rate of production, and preserve the value of the natural resource. Our inquiry into

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[4]The coal mines themselves, however, are subject to the imposition of liens in the event the taxes are not paid. Mont. Code Ann. § 15-23-704. We are not called upon to express a view on the validity of this provision as applied to Indian coal *in situ.*

the legislature's intent in this regard is limited to ascertaining the legal obligations imposed upon the concerned parties, however, and does not extend to divining the legislature's "true" economic object. *Gurley v. Rhoden,* 421 U.S. 200, 204-07, 95 S.Ct. 1605, 1608-10, 44 L.Ed.2d 404 (1975); *American Oil Co. v. Neill,* 380 U.S. 451, 455-57, 85 S.Ct. 1130, 1133-1134, 14 L.Ed.2d 1 (1965); *Federal Land Bank v. Bismarck Lumber Co.,* 314 U.S. 95, 99, 62 S.Ct. 1, 3, 86 L.Ed. 65 (1941); *Alabama v. King & Boozer,* 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941). But *see United States v. City of Leavenworth,* 443 F.Supp. 274, 281-82 (D.Kan. 1977).[5]

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[5]The Tribe also argues that Montana's taxes violate section 4 of the Enabling Act pursuant to which Montana was admitted to the Union. Section 4 provides:

> Second. That the people inhabitating said proposed States do agree and declare that they forever disclaim all all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . .

Act of February 22, 1889, ch. 180 § 4, 25 Stat. 676. This disclaimer was adopted and ratified in Montana's original constitution, Mont. Const. Ord. 1, 2 (1889), and in the state's new constitution.. Mont. Const. art. I (1972).

Because we find that the incidence of these taxes falls on on the non-Indian mineral lessee, we see no conflict between the taxes and the Enabling Act. *Truscott v. Hurlbut Land & Cattle Co.,* 73 F. 60 (9th Cir. 1896).

V

The Tribe argues that the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1976),[6] and the regulations promulgated thereunder, 25 C.F.R. §§ 171.1-.30 (1980)[7] sweep so broadly through the area of Indian mineral leasing that there is no room for state involvement.[8] *See Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); *Central Machinery Co. v. Arizona State Tax Comm'n,* 448 U.S. 160, 100 S.Ct. 2592, 2599, 65 L.Ed.2d 684 (1980). We need not view preemption as so comprehensive in this case because we find that the Tribe's allegations, if not contro-

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[6]The 1938 Act originally excluded the Crow Reservation from its coverage. 25 U.S.C. § 396f. Until 1959, mineral leasing on the Crow Reservation was governed by section 6 of the Crow Allotment Act of 1920, ch. 224 § 6, 41 Stat. 751, as amended by the Act of May 26, 1926, ch. 403, 44 Stat. 658. In 1959, Congress amended section 6 of the Crow Allotment Act of 1920 to provide that mineral leases on Crow lands were to be governed by provisions of the 1938 Act. Act of September 16, 1959, Pub. L. No. 86-283, 73 Stat. 565. *See also* Act of May 17, 1968, Pub. L. No. 90-308, 82 Stat. 123.

[7]See also 25 C.F.R. §§ 173.1-.29 (1980).

[8]The Tribe also argues that the taxes are preempted by the Tribe's enactment of its own coal severance tax on the mining of coal underlying the reservation and ceded strip. Absent a demonstration of congressional intent to delegate authority to the Tribe to preempt Montana's taxing statutes, the tribal ordinances carry no such preemptive effect.

The Tribe will have an opportunity to demonstrate on remand that Congress intended to delegate such regulatory and preemptive authority to the Tribe, and that there is a "direct conflict between state and tribal schemes." *Washington v. Confederated Tribes of Colville,* 447 U.S. 134, 156, 100 S.Ct. 2069, 2083, 65 L.Ed.2d 10. We note in this regard that 30 U.S.C. § 1300(a) (Supp.I 1977) indicates that Congress is contemplating a delegation to Indian tribes of some authority over surface mining on Indian lands. See note 17 *infra.*

verted, would establish that the challenged Montana taxes directly and substantially thwart the policies underlying the Mineral Leasing Act of 1938.

The 1938 Act[9] was designed to achieve three goals. *See* H.R.Rep.No. 1872, 75th Cong., 3d Sess. at 1-3 (1938); S.Rep.No. 985, 75th Cong., 1st Sess. 2-3 (1937); United States Dep't of Interior, *Federal Indian Law* 695 n.45 (1958). First, the Act sought to achieve uniformity in the law governing mineral leases on Indian lands. Prior law had been a statutory hodgepodge that imposed different requirements for mineral leases on different Indian

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[9]The 1938 Act provides that an Indian tribe may lease its lands for mining purposes with the approval of the Secretary of the Interior. 25 U.S.C. § 396a. Section 396b provides for the sale of oil and gas mining leases under regulations to be prescribed by the Secretary. The Secretary is authorized to reject all bids and readvertise leases when in the Secretary's judgment that course would be in the Indians' best interests. With the Indians' consent, a lease may be privately negotiated. Section 396b also safeguards the rights of tribes organized under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), to enter into mining leases in accordance with the provisions of that Act and with their tribal constitutions and corporate charters. Other sections specify the type of bond to be furnished by the lessees and authorize the Secretary to promulgate regulations. 25 U.S.C. §§ 396c, 396d.

The regulations promulgated by the Secretary under authority of the 1938 Act cover many aspects of mineral leasing between tribes and non-Indian lessees, including the procedures for acquiring mineral leases, minimum rates for rentals and royalties and the manner in which payments are to be made, penalties for failure to comply with the terms of leases, information to be supplied by lessees, acreage limitations, inspections of lessees' records by Indian lessors or by Department of Interior Officials, and cancellation of leases. 25 C.F.R. §§ 171.1-.30 (1980); *see also* 25 C.F.R. 66 173.-1-.29 (1980).

lands.[10] Second, the 1938 Act was designed to help achieve the broad policy of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), that tribal governments be revitalized. In the mineral leasing context, this meant giving tribal governments control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of Interior, where before the responsibility for such decisions was lodged in large part only with the Secretary.[11] Third, the 1938 Act was intended to encourage tribal economic development, an important objective of the Indian Reorganization Act of 1934. Prior to the 1938 Act, the leasing of Indian lands for mining purposes was gov-

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[10]The 1938 Act achieved uniformity by including all tribally-owned (unallotted) lands, on or off the reservation, within its ambit, and by repealing "[a]ll Act [sic] or parts of Acts inconsistent herewith." Section 7 of the Act, 52 Stat. at 348 (not codified but set out at 25 U.S.C. § 396a note). The latter provision probably repealed the prior leasing statutes. *See* 84 Interior Dec. 905 (1977); *cf. Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *cert. granted*, — U.S. —, 101 S.Ct. 71, 66 L.Ed.2d 21 (1981) (No. 80-11) (reserving the question). Since 1938, the Interior Department has operated under the 1938 Act with regard to Indian mineral leases. *See* 84 Interior Dec. 905 (1977).

[11]Early Indian mineral leasing legislation placed varying amounts of control over leasing decisions with the Indian agent in charge of the reservation, 25 U.S.C. § 397 (1976), and with the Secretary of the Interior. 25 U.S.C. § 399 (1976). The latter statute contained no provision for Indian consent to the leases and permitted the Secretary to prescribe reasonable terms and conditions. Other statutes provided that Congress could appropriate lease revenues for various purposes. 25 U.S.C. §§ 400a, 398b.

Tribal control over resources was further diluted by holdings that the secretary had no discretion in the granting of leases once land had been declared open for prospecting. In some cases, leases were granted over tribal objections. H.R.Rep.No. 1872, 75th Cong., 3d Sess. at 2 (1938); S.Rep.No.985, 75th Cong., 1st Sess. at 2 (1937).

erned by mining laws applicable to public lands generally. Technical requirements and complicated procedures under these laws had prevented the leasing of much of the Indians' land, thus depriving them of considerable revenue. *See* H.R.Rep.No. 1872, 75th Cong., 3d Sess. at 2 (1938); S.Rep. No. 985, 75th Cong., 1st Sess. at 2 (1937); 79 Cong. Rec. 7815 (1938) (remarks of Sen. Thomas), *Id.* at 8307-08 (remarks of Sen. Thomas). The 1938 Act provided that the land was to be leased by the Indians on terms restricted only by regulations to be adopted by the Secretary pursuant to the Act.

If the allegations of the complaint are sustained at trial, the Montana Coal Severance Tax will conflict with the purposes of the 1938 Act in several respects. Most prominently, the magnitude of the tax will prevent the Tribe from receiving a large portion of the economic benefits of its coal. The Montana legislature predicated its tax upon finding that strip coal

> is in sufficient demand that at least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes . . . .

Mont. Code Ann. § 15-35-101(1)(e).[12] By setting the severance tax rate at 30 percent of value, Montana made plain its intention to appropriate most of the economic rent. The substantial adverse effect on the Tribe's potential revenues is obvious when the state takes such a

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[12]"Economic rent" is the amount of revenue that can be extracted from an activity, here in the form of royalties and taxes, without significantly discouraging production.

large portion of this economic surplus.[13] The Tribe has alleged that, to date, Montana has realized $27 million from its severance tax while the Tribe has received only $8 million in royalties.[14]

Some economic impact on the Tribe can be justified if the state's interest in imposing the tax are legitimate. Of course, revenue raising to support government is a proper purpose behind most taxes. Montana's severance tax, however, has an unusual and additional purpose going far beyond revenue raising to support govern-

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[13]Montana argues that the Crow Tribe has not itself paid a penny in severance taxes, that Westmoreland is the only party that has been so burdened, and that the Tribe has therefore received everything to which it was entitled under the terms of the Westmoreland lease. Thus, the state contends, the Tribe has suffered no economic hardship from the tax.

The argument is unconvincing for several reasons. First, the Tribe's complaint asks for a declaration that the tax will not apply to production under future leases that the Tribe wishes to enter into. The Tribe has alleged that the tax will reduce the royalties future lessees would be willing to pay. In this regard, we note that Shell Oil Company has asserted in its *amicus* brief that Montana's taxes severely reduce the compensation Shell can offer the Tribe in its ongoing coal lease negotiations. Furthermore, the Tribe alleges that the royalties under the Westmoreland lease are subject to renegotiation every ten years, and that the Tribe could negotiate for a greater portion of the coal's value if the severance tax were declared to be inapplicable.

As to the taxes already paid by Westmoreland, however, it is true that the tribe has not paid any of the taxes and is apparently not entitled to any refund if the tax statutes are declared invalid.

[14]While none of the $27 million came out of the Crow Tribe's pocket, *see* note 13 *supra*, the disparity between the revenues of the state and those of the Tribe arguably indicates the extent to which the state is attempting to secure a large share of the economic surplus.

ment. The legislative subcommittee that gave birth to Montana's system of coal taxation described the severance tax device as follows:

> Severance Taxes are levied upon a state's natural resources for several reasons. One, obviously, is the need for revenue. Another is that a state's natural resources are nonrenewable. When the resources are mined, the state loses a valuable asset forever. The levying of a severance tax is one manner by which the state can share in the profits associated with the extraction of a mineral asset . . . .

Subcommittee on Fossil Fuel Taxation, Montana Legislative Council, *Fossil Fuel Taxation* 3 (Dec. 1974 Interim Study). This statement demonstrates a purpose to keep the value represented by the state's nonrenewable assets intact, for use by Montanans in the future. This purpose was implemented through the creation of the special trust fund under Article IX, Section 5 of the Montana Constitution. As discussed above, the fund is the major recipient of severance tax monies.[15] While the state may have an interest in perpetuating the value of mineral wealth subject to its general civil jurisdiction, it has no such legitimate interest in appropriating Indian mineral wealth.

Furthermore, the severance tax is more than a revenue-raising device. It has regulatory purposes as well. The Subcommittee on Fossil Fuel Taxation, in describing the purposes behind severance taxes, stated

> A severance tax . . . can help discourage resource waste; a basic assumption of severance taxation is that future generations will need mineral resources

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[15]See discussion at pp. 1108-1109 *supra*.

> similar to those used today. By being production [sic], a severance tax can encourage producers to manage their operations efficiently.

Subcommittee on Fossil Fuel Taxation, Montana Legislative Council, *Fossil Fuel Taxation* 3-4 (Dec. 1974 Interim Study). This coal is not the state's to regulate, and assertion of such authority diminishes the Tribe's own power to regulate. Such state action conflicts with the 1938 Act's purpose of allowing tribes to control the development of their mineral resources.

Montana asserts other legitimate interests, however, that if substantiated at trial may ultimately affect the outcome of the litigation. It argues that western states are burdened with the phenomenon of the "energy boomtown." Large-scale mining operations in rural areas place great strains on state and local governments to provide roads, schools, utilities, fire and police protection, recreation and health facilities, and other more subtle benefits such as a trained work force and an organized government and system of laws. Coal may be mined on the reservation or ceded strip, but the coal miner will undoubtedly be using state services and burdening state government. In addition, mining on the reservation or ceded strip could cause significant environmental effects elsewhere, such as ground and surface water pollution, air pollution, and solid waste disposal problems. The state may encounter substantial costs in dealing with these effects.

On balance, we suspect that these legitimate interests will not be shown to be enough to save the severance tax from fatal conflict with the purposes behind the 1938 Act.

A tax carefully tailored to effectuate the state's legitimate interests might survive. *Washington v. Confederated Tribes of Colville,* 447 U.S. 134, 163, 100 S.Ct. 2069, 2085, 65 L.Ed.2d 10 (1980).

One further complexity deserves mention. Westmoreland is mining coal on the ceded strip. As discussed at p. 1107 *supra,* the ceded strip has been severed from the reservation proper.[16] That being the case, the balance of responsibilities between state and tribal governments may be altered to some degree. The Supreme Court has recognized that the policy of protecting Indian sovereignty involves a "significant geographical component . . . which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limit." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 148, 100 S.Ct. 2578, 2586.

Although the non-Indian land status of the surface of the ceded strip might make a difference if the state were attempting to raise revenue to implement its legitimate regulatory responsibilities on the surface, the state has not designed its tax to meet those needs. Instead, it appears to have attempted to appropriate a portion of the value of tribal resources that has no relationship to the

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[16]Regardless of the reservation status of the surface of the ceded area, we think it clear that the Mineral Leasing Act of 1938 is applicable to the leasing of the underlying coal. See discussion at pp. 3521-3522 *supra.*

services, if any, it provides.[17] Inquiry in this regard can be had on remand.

As for the Gross Proceeds from Coal Tax, the record is insufficient at this stage of the proceedings to reveal what state, tribal, and federal interests may be involved, or to indicate whether the tax's impact is sufficient to thwart the policies of the 1938 Act. We find that the Tribe has made allegations sufficient to raise the possibility that the tax may conflict with the 1938 Act.

VI

The Tribe argues that Montana's taxes impermissibly infringe on the Tribe's ability to govern itself, and that the taxes therefore violate the principle articulated in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959), that, "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220, 79 S.Ct. at 271. In *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), The Supreme Court construed the *Williams v. Lee* test:

> [C]ases applying the *Williams* test have dealt principally with situations involving non-Indians. . . . In

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[17]We note that Congress has directed the Secretary of Interior to submit proposed legislation allowing tribes to assume regulatory authority under the Surface Mining Control and Reclamation Act of 1977. 30 U.S.C. §§ 1201-1328 (Supp. I 1977), over surface mining on "Indian lands." 30 U.S.C. 1300 (a). "Indian lands" are defined as "all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation . . . and all lands including mineral interests held in trust for or supervised by an Indian tribe." 30 U.S.C. § 1291(9).

> these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

411 U.S. at 179, 93 S.Ct. at 1266. We read *McClanahan* to require the reviewing court to balance the importance of the state interest in asserting the particular authority against the impact on the Tribe's ability to govern itself effectively. *Fort Mojave Tribe v. County of San Bernardino,* 543 F.2d 1253, 1257-58 (9th Cir. 1976).

The Tribe makes two arguments with respect to the self-government test. First, it argues that the state tax infringes on the Tribe's ability to levy its own severance tax.[18] Second, the Tribe contends that the state tax deprives it of the ability to negotiate with its lessees for higher royalties and thereby restricts its ability to generate revenues needed for tribal programs.

With respect to the tribal tax argument, we think that even if the state and tribal taxes were imposed on the same activity,[19] that fact alone would not preclude

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[18]It is now clear that, generally speaking, tribes retain the power to tax transactions that occur on trust lands and that significantly involve a tribe or its members. *Washington v. Confederated Tribes of Colville,* (1980) 447 U.S. 134, 152, 100 S.Ct. 2069, 2080, 65 L.Ed.2d 10.

[19]The Tribe's initial attempt to tax its lessees' coal production was partially frustrated by the Secretary of the Interior's refusal to sanction the Tribe's tax ordinances insofar as they applied to coal production on the ceded strip. The Secretary's refusal was based on the Tribe's constitution, which disclaimed authority over lands outside the reservation boundaries. The

(Continued on following page)

the state from imposing its tax. Each taxing body is free to impose its tax, since neither tax by its terms precludes the other. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 159, 100 S.Ct. 2069, 2084, 65 L.Ed.2d 10 (1980). As a practical matter, however, it is true that Montana's tax may force the Tribe to choose between imposing its tax, thereby discouraging coal mining, or foregoing tax revenues.

In our view, the Tribe's impairment-of-tribal-tax argument raises the same concerns as the more generalized argument that the tax infringes on self-government by preventing the Tribe from negotiating for higher royalties. Tribal economic enterprise is unique in that a tribe often engages in economic activity while simultaneously exercising more traditional governmental functions, such as taxation, with respect to the same activity. As a result, a tribe may obtain revenues either by manipulating the price of the goods it sells or by taxing its trading partners, where the tribe has taxing power. Which method a tribe chooses should be a matter of economic indifference to the parties, at least at the outset of the transaction.[20]

(Continued from previous page)

Tribe has since amended its constitution to allow it to tax mining activity on the ceded strip, and the tribal tax is once again being considered by the Secretary. The Secretary approved the tribal tax ordinance as it applied to the reservation proper.

Although it is true that, as far as Westmoreland's activities on the ceded strip are concerned, Montana's taxes and the tribal taxes do not presently conflict, the issue is nevertheless before us because the tribe has sought declaratory relief with regard to future mining operations on the reservation proper.

[20]The form in which the Tribe gets paid for the resource could be very significant if its taxing power is not limited by contract. If the Tribe is not bound, it would be able to adjust

(Continued on following page)

The effect on tribal self-government is the same whether the state tax is seen as impairing the Tribe's ability to negotiate for higher royalties or as leaving no excess value for the Tribe to tax. Therefore, we give no special force to the Tribe's impairment-of-tribal-tax argument and view the central problem as that of the state's depriving the Tribe of potential revenues.

The Tribe has alleged that the imposition, assessment, and collection of Montana's taxes "severely impaired the ability of the sovereign Crow Tribe to serve its people through its various programs and governmental services, including but not limited to its vitally important land repurchase program, its tribal cultural and historical program, its tribal educational program and its reservation maintenance services." For the purpose of considering a motion for dismissal, we accept as true the allegation that the economic impact of Montana's taxes on tribal government is severe.

Tribal economic activity, while perhaps providing the wherewithal for tribal governments to sustain themselves, is at best indirectly linked to the effectiveness of tribal government. It is clear that a state tax is not invalid merely because it erodes a tribe's revenues, even when the tax substantially impairs the tribal government's ability to sustain itself and its programs. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 152-156, 100 S.Ct. 2069, 2080-2083, 65 L.Ed.2d 10 (1980).

(Continued from previous page)

its tax rate to changing economic conditions. In theory, this would allow it always to extract the maximum economic rent from the good or service without the necessity of renegotiating its royalty agreements.

In Washington v. Confederated Tribes of Colville, 447 U.S. at 152, 100 S.Ct. 2083, however, the Supreme Court impliedly recognized that a state's power to tax may be limited when such taxes adversely affect tribal revenues arising from certain goods and services. The Court, in the course of holding that the state could tax on-reservation sales of cigarettes by Indians to non-Indians, noted that "the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest," 447 U.S. at 152, 100 S.Ct. at 2083. The Court further stated:

> The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other. While the Tribes do have an interest in raising revenues for essential governmental programs, *that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.* The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

447 U.S. at 156-157, 100 S.Ct. at 2083 (citation omitted) (emphasis supplied).

In this case, the revenues sought to be taxed by Montana may ultimately be traced to the Tribe's mineral resources, a component of the reservation land itself. This is not a case where the tribe is simply marketing a tax exemption, as where tribes seek to sell tax-free cigarettes to

non-Indians. Any substantial incursion into the revenues obtained from the sale of the Indians' land-based wealth cuts to the heart of the Tribe's ability to sustain itself.

As we have discussed, the Montana legislature has made clear its intention to appropriate a large portion of the surplus economic value of this coal. A major purpose of the tax is to establish a fund that would keep the value of the coal for future generations of Montanans. To the extent that this tax is not related to the actual governmental costs associated with the mining of the Indian coal, *see Washington v. Confederated Tribes of Colville*, 447 U.S. at 163, 100 S.Ct. at 2086, the state's interest in acquiring revenues is weak in comparison with the Tribe's right to the bounty from its own land.

We find that the Tribe's complaint adequately states a claim that the Montana taxes infringe on its right to govern itself. To support the claim at trial, the Tribe must show that the taxes substantially affect its ability to offer governmental services or its ability to regulate the development of tribal resources, and that the balance of state and tribal interests renders the state's assertion of taxing authority unreasonable.

Reversed and remanded for proceedings consistent with this opinion.

6. Order Amending Court of Appeals' July 13, 1981 Opinion Filed January 5, 1982

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-4321

CROW TRIBE OF INDIANS,

Appellant,

v.

STATE OF MONTANA, and RAMON DORE,
Director, Montana Department of Revenue,

Appellees.

FILED
JAN 5 1982
CLERK, U.S. COURT OF APPEALS

ORDER

Before: TANG, FLETCHER and ALARON, Circuit Judges.

The opinion 650 F.2d 1104 (9th Cir.) filed July 13, 1981 is amended as follows: The following footnotes are added:

4a footnotes the sentence on page 1111, left hand column, ending on line 4 with the word "tax":

"4a The tax incidence on the Tribe's royalty interest was not at issue and was not reached by the court."

15a footnotes the sentence on page 1114, right-hand column ending on line 21 with the citation to *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 163, 100 S.Ct. 2069, 2085, 65 L.Ed. 2d 10 (1980):

> "15a Appellees, in their petition for rehearing call to our attention *Commonwealth Edison Co. v. Montana*, 49 U.S.L.W. 4957 (July 2, 1981). In that case, in the context of a challenge to the Montana coal severance tax as a burden on interstate commerce, the Court upheld the tax against the challenge that it is not fairly related to the services provided by the state. The Court stated that wide latitude is afforded the states under the Due Process Clause in imposing taxes upon particular activities. It went on to note that no direct benefit need be shown to the class or individuals taxed, and that this latitude afforded the states is not changed merely because the taxed activity has some connection to interstate commerce. Completely different considerations are implicated in the case before us. Our task is to determine the limits of state power to tax Indian tribes, Indian-related activities and Indian trust property. Different congressional acts are at issue. Congressional policy with respect to Indian tribes is involved here, not the constitutionality of the tax. We do not find *Commonwealth Edison* to control this case as suggested by appellees."

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the proposal to amend the opinion, and of the suggestion for en banc rehearing, and no judge has objected to the amendment or requested a vote on the suggestion for rehearing en banc. Fed.R.App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

7. Appellants' Notice of Appeal Pursuant to 28 U.S.C. § 1254(2) Filed with Court of Appeals July 24, 1987

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CROW TRIBE OF INDIANS,	)	No. 86-3842
	)	No. 86-3845
Plaintiff-Appellant,	)	
	)	
and	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Intervenor-Appellant,	)	
	)	
-v-	)	NOTICE OF APPEAL
STATE OF MONTANA, et al.,	)	
	)	
Defendants-Appellees,	)	
	)	
and	)	
	)	
WESTMORELAND RESOURCES, INC.,	)	
	)	
Defendant-Intervenor-Appellee.	)	

Notice is hereby given that defendants-appellees State of Montana, John D. LaFaver, Big Horn County, Yellowstone County, Treasure County, Lorraine Hamilton, May Jenkins, and Kathleen Thomas appeal to the United States Supreme Court pursuant to 28 U.S.C. § 1254(2) from the opinion and judgment entered herein on June 11, 1987.

Respectfully submitted this 21st day of July, 1987.

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By: /s/ Clay R. Smith
Assistant Attorney General

8. Third Amended Complaint for Declaratory Judgment, Injunction, Restitution, Tax Refunds, Money Damages, and Other Relief Filed November 22, 1982

Plaintiff, CROW TRIBE OF INDIANS, by their attorneys, bring this action against the above-named defendants and allege as follows:

JURISDICTION

1. This is a civil action for injunctive, declaratory, restitutionary, tax refunds, money damages, and other relief. It arises under Article I, Section 8, Clause 3 of the Constitution of the United States; under the Indian Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1976); under the Act of September 16, 1959, 73 Stat. 565, and the Act of May 17, 1968, 82 Stat. 123; under the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1008; under Sestion 4 of the Enabling Act of February 22, 1889, 25 Stat. 575; and under 42 U.S.C. § 1983. This Court has jurisdiction under 28 U.S.C. §§ 1362 and 1343.

PARTIES

2. Plaintiff CROW TRIBE OF INDIANS (hereinafter "the Tribe") is a sovereign American Indian tribe, with a governing body, the Crow Tribal Council, duly recognized by the United States Secretary of the Interior as the governing body of the Crow Indian Reservation.

3. Defendant STATE OF MONTANA (hereinafter "State" or "Montana") is a sovereign State of the Union, pursuant to the Enabling Act of February 22, 1889, 22 Stat. 676.

4. Defendant ELLEN FEAVER is Director of the Montana Department of Revenue. She is sued in her official capacity; her official address is: Department of Rev-

enue, Sam W. Mitchell Building, Rm. 455, Helena, Montana 59601.

5. Defendant BIG HORN COUNTY, Montana, is a political subdivision of the State. Part of the Crow Indian Reservation and of the Crow Tribe's reserved coal resources is encompassed within the exterior boundaries of Big Horn County.

6. Defendant YELLOWSTONE COUNTY, Montana, is a political subdivision of the State. Part of the Crow Indian Reservation and of the Crow Tribe's reserved coal resources is encompassed within the exterior boundaries of Yellowstone County.

7. Defendant TREASURE COUNTY, Montana, is a political subdivision of the State. Part of the Crow Tribe's reserved coal resources are encompassed within the exterior boundaries of Treasure County.

8. Defendant LORRAINE HAMILTON is Treasurer of Big Horn County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Box 8, Hardin, Montana 59034.

9. Defendant MAY JENKINS is Treasurer of Yellowstone County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Billings, Montana 59101.

10. Defendant CLARIBEL BONINE is Treasurer of Treasure County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Box 429, Hysham, Montana, 59038.

11. The United States holds in trust and the Tribe is the beneficial owner of vast coal resources underlying the Crow Reservation and an area known as the "ceded

area" that was opened to allotment and settlement by non-Indians pursuant to the Act of April 17, 1904, 33 Stat. 352. In all, the plaintiff Tribe is the beneficial owner of approximately six billion tons of coal within the State. Smaller amounts of coal underlying the Crow Reservation are owned by persons or entities other than the Tribe. The United States manages and supervises the Tribe's trust assets through the Department of the Interior and the Bureau of Indian Affairs (hereinafter "BIA").

12. Since 1967, pursuant to the Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1970), the Act of September 16, 1959, 73 Stat. 565, and the Act of May 17, 1968, 82 Stat. 123, the United States Secretary of the Interior and the Commissioner of BIA (now the Assistant Secretary of the Interior for Indian Affairs) have actively recommended, encouraged, advised, and approved transactions involving the development of Crow coal resources.

13. On September 16, 1970, Westmoreland Resources, Inc. (hereinafter "Westmoreland") was the successful bidder at a sale of prospecting permits covering Crow coal underlying 34,671 acres in the ceded area. On June 6, 1972, Westmoreland and the Tribe executed two leases embracing the coal underlying 30,876.25 acres of that land. The Westmoreland leases were approved by the BIA on June 14, 1972. Those leases were subsequently amended, and the amended Westmoreland leases were approved on December 6, 1974. One of the leases, which encompassed approximately 16,130 acres, was subsequently terminated by mutual consent of the Tribe and Westmoreland with the approval of the Department of the Interior. Westmoreland is the only lessee currently mining Crow coal. The existing lease was amended by agreement dated July

10, 1982 which was approved by the BIA on September 29, 1982.

14. On May 8, 1980, the Tribe entered into a lease with the Shell Oil Company embracing Crow coal underlying approximately 2,560 acres within the Crow Indian Reservation. This agreement also includes various options for mining Crow coal underlying additional acreage within the Crow Reservation. The agreement and lease will become effective when approved by the Secretary of the Interior or his authorized representative.

15. The Tribe is currently negotiating with several other companies who have expressed considerable interest in entering into leases, joint ventures, or other mining agreements with the Crow Tribe for the development and production of Crow coal.

16. In 1975, the State enacted statutes which imposed on coal mine operators a severance tax on each ton of coal produced in the State and a gross proceeds tax on the sale on each ton of coal produced in the State. Montana Code Annotated §§ 15-35-101 through 15-35-111, 15-23-701 through 15-23-704.

17. Defendants Feaver, Hamilton, Jenkins, and Bonine are the state and county officials charged by Montana law with the enforcement and collection of the Montana coal severance and gross proceeds taxes.

18. Most of the Crow coal is, or will be, mined from the surface and is, or will be, taxed at the rate of 30% of the contract sales price pursuant to the State's severance tax statute. Since 1975 and 1976, Westmoreland has paid more than $54,000,000 in state severance taxes and approximately $7,000,000 in gross proceeds taxes on the production and sale of the coal under lease from the Crow

Tribe. During this same period, Westmoreland has paid the Crow Tribe approximately $15,000,000 in royalties pursuant to its lease.

19. There are approximately 6,000 members of the plaintiff Tribe, approximately 4,500 of whom reside on the Crow Reservation. The Crow people retain a significant degree of tribal culture, maintaining the Crow language and Crow tribal ceremonies and customs. To date, the Crow people have generally derived meager economic sustenance through the ownership and use of farming and grazing lands on the reservation. Historically, the Crow people have suffered from extremely high rates of unemployment and a very poor economic status. The development of tribal coal offers an unprecedented opportunity for the Crow people to improve their economic situation.

20. The Crow Tribe and its members are severely impoverished. The Tribe is deeply in debt; it does not have sufficient revenues to provide adequate services; and the unemployment rate among tribal members is extremely high, much higher than among the non-Indian populations of Montana and adjacent states.

21. The Crow Tribe's existing coal mining leases with Westmoreland and Shell include provisions which require the lessees to pay the Tribe amounts equal to Montana's taxes less whatever the lessees are required to pay to the State.

22. The imposition, assessment and collection of the 30% state severance tax and the gross proceeds tax have imposed a direct and severe burden upon the plaintiff Tribe in that the taxes are a direct and major cost associated with the production of Crow coal.

23. The natural and immediate consequences of the imposition, assessment, and collection of these taxes have

been: (i) drastically increased costs to purchasers of Crow coal; (ii) a correspondingly severe restriction upon the amount of royalty payments which Westmoreland and others have been willing to pay to the plaintiff Tribe under their leases; and (iii) the frustration of efforts by the Tribe to renegotiate its leases with Westmoreland and others. The state severance and gross proceed taxes have adversely affected the competitive status of Crow coal and, when taken in conjunction with the Crow tribal tax, may increase the cost of Crow coal so drastically as to render that coal noncompetitive in the marketplace and thereby threaten to preclude further Crow coal development.

24. The existence of the 30% state severance tax and the gross proceeds tax has frustrated efforts by the Tribe to negotiate or renegotiate leases with the other permittees and lessees of Crow coal and has severely depressed the amount of royalties which those permittees and lessees are willing and able to pay to the Tribe under any such leases or pursuant to other arrangements.

25. The existence of the 30% state severance tax and the gross proceeds tax and the gross proceeds tax has also frustrated efforts by the Tribe to offer permits and leases covering additional coal deposits in the ceded area and elsewhere on the reservation. It has also rendered the Tribe incapable of entering into any fair arrangements for the development of tribal coal or of developing its own coal pursuant to mining contracts with persons capable of performing the actual mining of such coal.

26. Prior to and since the enactment of the challenged tax laws, Crow tribal representatives, by correspondence and by testimony before the Montana legislature,

have consistently protested the imposition of these unlawful taxes upon Crow coal, to no avail.

27. Plaintiffs are without recourse to any remedies other than those sought by this Complaint and, unless such relief is granted, they will continue to suffer immediate and irreparable injury.

28. An actual controversy has arisen and now exists between the plaintiff and the defendants as to the validity of the State's severance and gross proceeds taxes as applied to Crow owned coal and to coal underlying the Crow Indian Reservation.

FIRST CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 28.

29. The Constitution of the United States, Article I, Section 8, Clause 3, grants the Congress of the United States exclusive authority over commerce with Indian tribes. Montana's severance and gross proceeds taxes on the sale and production of Crow owned coal and on all of the coal underlying the Crow Indian Reservation have not been authorized by Congress. These Montana taxes therefore constitute an unlawful and unconstitutional interference with Congress' exclusive authority over Indian commerce.

SECOND CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 29.

30. Montana's severance and gross proceeds taxes on the sale and production of Crow owned coal and on all of the coal underlying the Crow Indian Reservation are inconsistent with, and under the Supremacy Clause of the United States Constitution, are preempted by, the Indian

Mineral Leasing Act of 1938, and its implementing regulations, 25 C.F.R. §§ 171.1-171.30, 173.1-173.29 insofar as those taxes: (i) deprive the Crow Tribe of its authority and control over its mineral resources; (ii) severely discourage the economic development of the Crow Reservation; (iii) deprive the Crow Tribe of a very large portion of the economic benefits of its coal; (iv) diminish substantially the power of the Crow Tribe to regulate the development of its mineral resources; or (v) appropriate to the State a significant portion of the value of the Tribe's coal resources that has no relationship to the services, if any, related to the development of that resource provided by the State and its political subdivisions.

THIRD CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 30.

31. Montana's 30% severance tax is invalid on its face as applied to all Crow owned coal and to all the coal underlying the Crow Indian Reservation because: (i) the purpose of the tax is to appropriate most of the economic rent attributable to the production of such coal; (ii) the magnitude of the tax is enormous in and of itself and is significantly greater than comparable taxes imposed by other states; and (iii) 50% of the proceeds of the tax are paid into a trust fund which can be used for any governmental purpose, is not tied in any way to State costs or services attributable to the mining and production of such coal, and has the effect of appropriating the Crow Tribe's mineral wealth for the benefit of the State.

FOURTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraph 1 through 31,

32. Montana's severance and gross proceeds taxes on the sale and production of Crow owned coal and on all of the coal underlying the Crow Indian Reservation have:

(i) illegally subjected the property of the sovereign Crow Tribe and the property subject to the Tribe's jurisdiction to an unauthorized state tax;

(ii) illegally reduced the ability of the sovereign Crow Tribe and its members to realize full benefit, use and development of their land, thereby depriving them of liberty and property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution and of the federally protected and guaranteed rights of the Tribe and its members;

(iii) illegally threatened and interfered with the ability of the sovereign Crow Tribe to exercise its sovereignty through tribal taxes;

(iv) illegally and severely infringed upon the right and ability of the sovereign Crow Tribe to govern itself and its people;

(v) illegally and severely impaired the ability of the Crow Tribe to serve its people through its various tribal programs and governmental services, including but not limited to its vitally important land repurchase program, its tribal cultural and historical program, its tribal educational program and its reservation maintenance services; and

(vi) illegally and severely impaired the ability of the sovereign Crow Tribe to engage in various economic development activities aimed at producing vitally needed jobs for tribal members and reservation residents and income for the Tribe and its members.

33. Montana's severance and gross proceeds taxes on the sale and production of Crow owned coal and on all of the coal underlying the Crow Indian Reservation infringe on and interfere with the rights of the Crow Indians to make their own laws and be ruled by them.

FIFTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 33.

34. On January 31, 1976, the plaintiff Tribe enacted its own tribal coal taxation code, which imposes upon persons mining Crow coal a severance tax of 25% of the value of Crow coal mined by such persons. On January 17, 1977, the Secretary of the Interior approved the Crow taxation code to the extent that it applied to coal underlying the Crow Reservation proper, but disapproved the tax to the extent that it applied to the Crow Tribe's coal in the ceded strip. The Crow Tribe has also enacted a gross proceeds tax on the sale of Crow coal.

35. On July 10, 1982, the Crow Tribe and Westmoreland agreed to an amendment to their coal mining lease under which Westmoreland recognized the right of the Crow Tribe to levy and collect severance and gross proceeds taxes on the production and sale of Crow owned coal in the ceded strip. That amendment was approved by the Bureau of Indian Affairs on September 29, 1982.

36. The Crow tribal severance and gross proceeds taxes enacted and agreed to in exercise of the Tribe's sovereignty and approved by the Secretary of the Interior pursuant to congressionally delegated authority in the implementation of federal policy, preempts state taxation of the subject coal.

SIXTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 36.

37. Montana's severance and gross proceeds taxes on the sale and production of Crow coal and on all of the coal underlying the Crow Indian Reservation is unconstitutional because it constitutes a multiple and impermissible burden on interstate commerce in violation of the Interstate Commerce Clause of the Constitution, Article I, Section 8, Clause 3.

SEVENTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 37.

38. Defendants are required to give all producers and sellers of Crow coal and of all coal underlying the Crow Indian Reservation a credit against Montana's severance and gross proceeds taxes for the full amount of any and all severance and gross proceeds taxes paid by such producers and sellers to the Crow Tribe.

EIGHTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 38.

39. The State's severance and gross proceeds taxes constitute unlawful taxes on the property of the Crow Tribe held in trust by the United States insofar as the State's taxes are based in part on the value of the Crow Tribe's royalty interest.

NINTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 39.

40. All of the serevance and gross proceeds taxes collected by the State of Montana from Westmoreland based on the sale and production of coal mined pursuant to the lease between Westmoreland and the Crow Tribe have been illegal and unconstitutional.

41. Montana's severance and gross proceeds taxes as applied to Crow owned coal and to coal underlying the Crow Indian Reservation are now illegal and have been illegal since collections began in 1975 and 1976 respectively. The effect of these taxes has been to deprive the Crow Tribe of its rights under federal law, to diminish substantially the value of the Crow Tribe's coal resources, and to impinge and interfere with the Tribe's sovereign right to govern its reservation.

42. The Crow Tribe is entitled to a refund of all severance and gross proceeds taxes that have been paid to the defendants on the production, and sale of Crow owned coal and of coal underlying the Crow Indian Reservation.

TENTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 42.

43. Defendants have been unjustly enriched and have wrongfully profitted from the collection of severance and gross proceeds taxes on the production and sale of Crow owned coal and coal underlying the Crow Indian Reservation. The plaintiff Crow Tribe of Indians is entitled to restitution of those illegally collected funds in order to restore to the plaintiff and to take away from the defendants the benefits and monies that rightly belong to the plaintiff.

ELEVENTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 43.

44. The existence of Montana's severance and gross proceeds taxes on Crow owned coal and on the coal underlying the Crow Indian Reservation has stifled and caused severe reductions in the amount of such coal that otherwise would have been mined, produced and sold. The plaintiff Crow Tribe has been and continues to be severely damaged by such reductions.

TWELFTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 44.

45. It is unfair, unconscionable and inequitable for the defendants to hold, benefit from and utilize the revenues collected from severance and gross proceeds taxes that have been imposed on the production and sale of Crow owned coal and on coal underlying the Crow Indian Reservation. It is necessary to impose a constructive trust on such funds for the benefit of the plaintiff Crow Tribe of Indians in order to prevent unjust enrichment to the defendants.

THIRTEENTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 45.

46. Plaintiff is and has been the beneficial owner of the sums of money that have been paid to the defendants in the form of severance and gross proceeds taxes on the production and sale of Crow owned coal and of coal under-

lying the Crow Indian Reservation. The defendants have wrongfully converted these sums of money. The defendants are liable to the plaintiff for the value of such wrongfully converted property.

FOURTEENTH CAUSE OF ACTION

Plaintiff repeats and realleges by reference each and every allegation set forth in paragraphs 1 through 46.

47. By reason of the allegations set forth in this complaint, plaintiff is entitled to additional sums as punitive or exemplary damages from the State.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for the following relief:

1. A judgment declaring that the Montana Coal Severance Tax, M.C.A. §§ 15-35-101 to 15-35-111, and the Montana Gross Proceeds Tax, M.C.A. §§ 15-23-701 to 15-23-704, are invalid and have been preempted by federal law as applied to all coal that is held by the United States in trust for the Crow Tribe of Indians and to all coal underlying the Crow Indian Reservation;

2. A judgment enjoining the defendants from imposing, collecting, and enforcing the Montana Coal Severance Tax and the Montana Gross Proceeds Tax on all coal that is held by the United States in trust for the Crow Tribe of Indians and to all coal underlying the Crow Indian Reservation;

3. A judgment ordering the defendants to give all producers and sellers of Crow coal and of all coal under-

lying the Crow Indian Reservation a credit against Montana's severance and gross proceeds taxes for the full amount of any and all severance and gross proceeds taxes paid to the Crow Tribe of Indians.

3 [sic]. A judgment awarding the Crow Tribe of Indians all severance and gross proceeds taxes that have been paid to the defendants based on the production or sale of all coal held by the United States in trust for the Crow Tribe of Indians and all coal underlying the Crow Indian Reservation;

4. A judgment declaring that all tax revenues that have been collected by the defendants based on the production and sale of Crow coal and all coal underlying the Crow Indian Reservation are held by the defendants in constructive trust for the sole use and benefit of the Crow Tribe of Indians and ordering the defendants to utilize, invest, dispose of, and expend all such funds for the sole use and benefit of the Crow Tribe of Indians.

5. A judgment awarding the Crow Tribe of Indians punitive or exemplary damages in an amount to be determined by the Court.

6. A judgment awarding the Crow Tribe of Indians cost of suit, expert witness fees, and attorneys' fees.

7. For such additional relief as the Court may deem just and proper.

DATED: November 19, 1982.

VERIFICATION

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

I, Donald W. Stewart, Sr., being first duly sworn, deposes and says:

1. I am the Chairman of the Crow Tribe of Indians.

2. I have read the Third Amended Complaint of the Crow Tribe of Indians in the case of *Crow Tribe v. Montana*, Civil No. 78-110-BLG, in the United States District Court for the District of Montana, Billings Division. The statements made in the Third Amended Complaint are true and are based on my own knowledge, information, and belief.

/s/ Donald A. Stewart, Sr.

SUBSCRIBED AND SWORN TO before me this 16th day of November, 1982, by Donald A. Stewart, Sr.

My Commission Expires March 11, 1986
West Paul St. #240
Boulder, Colorado 80302

/s/ (Illegible)
Notary Public

9. Answer of Defendants to Third Amended Complaint Filed December 20, 1982

Defendants State of Montana and Ellen Feaver, Director of the Montana Department of Revenue, Big Horn County, Montana and Lorraine Hamilton, Treasurer of Big Horn County, Montana, Yellowstone County, Montana and May Jenkins, Treasurer of Yellowstone County, Montana, Treasure County, Montana and Claribel Bonine, Treasurer of Treasure County, Montana, by their attorneys, answer the plaintiff's Third Amended Complaint (hereinafter called "complaint") as follows:

FIRST DEFENSE

The complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

This court lacks jurisdiction over the subject matter of the complaint.

THIRD DEFENSE

This action is barred by the Eleventh Amendment to the United States Constitution.

FOURTH DEFENSE

The taxes which are the subject of the complaint are specifically authorized to be collected by virute of the Indian Mineral Leasing Act, Act of May 29, 1924, Chapter

210, 43 Stat. 244 (25 U.S.C. §§ 398), and the Act of May 11, 1938, Chapter 198, 52 Stat. 347 (25 U.S.C. §§ 396a-396f).

FIFTH DEFENSE

1. The allegations of paragraph 1 of the complaint are conclusions of law and require no answer, but are nevertheless denied.

2. Admit the allegations of paragraphs 2 through 10.

3. Answering the allegations of paragraph 11, admit that there is an area of land known as the Crow Reservation and as the "ceded area", once part of the Crow Reservation which area was opened to allotment and settlement by non-Indians pursuant to the Act of April 17, 1904, 33 Stat. 352; lack knowledge as to the amount of the coal beneficially owned by the Crow Tribe on the reservation or within the ceded area and therefore deny the allegation that the Tribe is the beneficial owner of six billion tons of coal; admit that there are amounts of coal underlying the Crow Reservation which are owned by persons or entities other than the Tribe; allege that there are vast amounts of coal underlying the ceded area which are not owned by the Crow Tribe; lack knowledge as to the amounts of coal owned by the Crow Tribe; admit that the United States manages and supervises the Tribe's trust assets through the Department of the Interior and the Bureau of Indian Affairs (hereinafter called "BIA"); deny the remaining allegations contained in paragraph 11.

4. Answering paragraph 12 of the complaint, admit the existence of the cited statutes; lack knowledge as to

the truth of the remaining allegations in paragraph 12 and therefore deny them.

5. Answering paragraph 13 of the complaint, admit that Westmoreland Resources, Inc. (hereinafter "Westmoreland") is currently a lessee mining coal held by the United States in the ceded area; admit the existence of the agreement between the Crow Tribe and Westmoreland dated July 10, 1982, and that the agreement was approved by the BIA on September 29, 1982; lack sufficient knowledge as to the truth of the remaining allegations in paragraph 13 and therefore deny them.

6. Lack sufficient knowledge as to the truth of the allegations contained in paragraphs 14 and 15 of the complaint and therefore deny them.

7. Answering the allegations of paragraph 16 of the complaint, admit that in 1975 the legislature of the State of Montana enacted a statute which imposed on coal mine operators a severance tax an each ton of coal produced in the state (Montana Code Annotated §§ 15-35-101 through 15-35-111) and a gross proceeds tax on the sale of each ton of coal produced in the state (M.C.A. §§ 15-23-701 through 15-23-704); deny every other allegation of paragraph 16.

8. Answering the allegations of paragraph 17, admit that defendant Feaver, as the Director of the Montana Department of Revenue, is charged by law with the enforcement and collection of the Montana coal severance tax; admit that defendant Feaver, as Director of the Montana Department of Revenue, is charged with receiving the reports of the gross yield from coal (M.C.A. § 15-23-701)

and with certifying the assessments of the gross proceeds from coal through the county assessors (M.C.A. §§ 15-23-702 and 15-23-703); deny that the Department of Revenue or defendant Feaver is charged with the enforcement and collection of the Montana gross proceeds tax; admit that the county treasurers are charged with levying and collecting the Montana gross proceeds tax (M.C.A. §§ 15-23-703 and 15-23-704); deny that the county treasurers are charged with the enforcement and collection of the Montana coal severance tax; deny the remaining allegations contained in paragraph 17.

9. Answering the allegations contained in paragraph 18, deny that Westmoreland has paid more than $54,000,000 in state severance taxes, but alleges Westmoreland has paid approximately $53,300,000 in state severance taxes; deny that Westmoreland has paid approximately $7,000,000 in gross proceeds taxes on the production and sale of coal under lease from the Crow Tribe; allege Westmoreland has paid approximately $6,700,000 in gross proceeds tax; allege that the Montana severance tax is imposed pursuant to M.C.A. § 15-35-103 in accordance with the heating quality of the coal, and that most of the coal produced by Westmoreland has been taxed at the rate of 30% of the contract sales price; lack knowledge as to the truth of the remaining allegations in paragraph 18 and therefore deny them.

10. Lack knowledge as to the truth of the allegations contained in paragraphs 19, 20 and 21, and therefore deny them.

11. Deny the allegations contained in paragraphs 22, 23, 24 and 25.

12. Answering the allegations contained in paragraph 26, admit that by correspondence and by testimony before the Montana Legislature, Crow tribal representatives have protested the imposition of the coal severance tax and gross proceeds from coal taxes upon coal allegedly beneficially owned by the Crow Tribe; deny that these taxes are unlawful; deny that these taxes are upon Crow coal; deny the remaining allegations in paragraph 26.

13. Deny the allegations contained in paragraphs 27 and 28 of the complaint.

PLAINTIFF'S FIRST CAUSE OF ACTION

14. Answering the first cause of action and paragraph 29 of the complaint, defendants repeat by reference each answer and allegations set forth above in response to paragraphs 1 through 28 of the complaint; admit the allegation of paragraph 29 that the Constitution of the United States, Article I, Section 8, Clause 3, grants to the Congress of the United States authority over commerce with Indian tribes; deny the remaining allegations of paragraph 29.

PLAINTIFF'S SECOND CAUSE OF ACTION

15. Answering the second cause of action of the complaint, defendants repeat by reference all of the answers and allegations set forth above in response to paragraphs

1 through 29 of the complaint, and deny the allegations contained in paragraph 30 of the complaint.

PLAINTIFF'S THIRD CAUSE OF ACTION

16. Answering the third cause of action in the complaint, defendants repeat by reference all answers and allegations set forth above in response to paragraphs 1 through 30 of the complaint; deny the allegations contained in paragraph 31 of the complaint.

PLAINTIFF'S FOURTH CAUSE OF ACTION

17. Answering the fourth cause of action in the complaint, defendants repeat by reference all answers and allegations set forth above in response to paragraphs 1 through 31 of the complaint; deny the allegations contained in paragraphs 32 and 33 of the complaint.

PLAINTIFF'S FIFTH CAUSE OF ACTION

18. Answering the fifth cause of action in the complaint, defendants repeat by reference all answers and allegations set forth above in response to paragraphs 1 through 33 of the complaint; answering paragraph 34 of the complaint, admit the allegations pertaining to the Crow Tribe's severance tax as applied to coal beneficially owned by the Crow Tribe on the Crow Reservation; deny that they have sufficient knowledge as to the truth of the remaining allegations and therefore deny them.

19. Answering paragraph 35, admit the existence of the July 10, 1982 agreement between the Crow Tribe and

Westmoreland and that the agreement was approved by the BIA on September 29, 1982; allege that the agreement speaks for itself and deny any allegations inconsistent with the agreement, and deny every other allegation in paragraph 35.

20. Deny the allegations contained in paragraph 36.

PLAINTIFF'S SIXTH CAUSE OF ACTION

21. Answering the allegations contained in the sixth cause of action, defendants repeat by reference all answers and allegations set forth above in response to paragraphs 1 through 36 of the complaint; deny the allegations contained in paragraph 37.

PLAINTIFF'S SEVENTH CAUSE OF ACTION

22. Answering the allegations contained in the seventh cause of action in the complaint, defendants repeat by reference all answers and allegations set forth above in response to paragraphs 1 through 37 of the complaint; deny the allegations of paragraph 38.

PLAINTIFF'S EIGHTH CAUSE OF ACTION

23. Answering the allegations contained in the eighth cause of action, defendants repeat by reference all answers and allegations set forth above in response to paragraphs 1 through 38 of the complaint; deny the allegations contained in paragraph 39.

PLAINTIFF'S NINTH CAUSE OF ACTION

24. Answering the allegations of the ninth cause of action, defendants repeat by reference all answers and allegations set forth above in response to paragraphs 1 through 39 of the complaint; deny the allegations contained in paragraphs 40, 41 and 42; allege that Crow Tribe is barred by the Eleventh Amendment and by 28 U.S.C. § 1341 from seeking a refund of any severence and gross proceeds taxes paid by Westmoreland.

PLAINTIFF'S TENTH CAUSE OF ACTION

25. Answering the tenth cause of action, defendants repeat by reference all answers and allegations set forth above in response to paragraphs 1 through 42 of the complaint; deny the allegations contained in paragraph 43.

PLAINTIFF'S ELEVENTH CAUSE OF ACTION

26. Answering the eleventh cause of action, defendants repeat by reference all answers and allegations set forth above in response to paragraphs 1 through 43 of the complaint, deny the allegations contained in paragraph 44.

PLAINTIFF'S TWELFTH CAUSE OF ACTION

27. Answering the twelfth cause of action, defendants repeat by reference all answers and allegations set forth above in response to paragraphs 1 through 44; deny the allegations contained in paragraph 45.

PLAINTIFF'S THIRTEENTH CAUSE OF ACTION

28. Answering the allegations contained in the thirteenth cause of action, defendants repeat by reference all answers and allegations set forth above in response to paragraphs 1 through 45 of the complaint; deny the allegations contained in paragraph 46.

PLAINTIFF'S FOURTEENTH CAUSE OF ACTION

29. Answering the fourteenth cause of action, defendants repeat by reference all answers and allegations set forth above in response to paragraphs 1 through 46; deny the allegations contained in paragraph 47.

WHEREFORE, defendants request relief as follows:

1. That defendants be granted judgment in their favor;

2. That plaintiff take nothing by this complaint;

3. That defendants be awarded their costs herein; and

4. That defendants be granted such other and further relief as the court may deem just and proper.

DATED December 20, 1982.

10. **Article VI, Clause 2 of the United States Constitution Supreme Law of Land**

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

11. Act of April 27, 1904, 33 Stat. 352

—An Act To Ratify And Amend An Agreement With The Indians Of The Crow Reservation In Montana, And Making Appropriations To Carry The Same Into Effect.

Whereas Benjamin F. Barge, James H. McNeely, and Charles G. Hoyt, acting for and on behalf of the United States, did, on the fourteenth day of August, A. D. eighteen hundred and ninety-nine, make and conclude an agreement with the Indians of the Crow Reservation, in Montana, which said agreement is in words and figures as follows:

Whereas Benjamin F. Barge, James H. McNeely, and Charles G. Hoyt, being duly appointed as commissioner[s] on behalf of the United States by the Secretary of the Interior under and by virtue of an act of Congress approved June 10th, 1896 (29 U.S. Statutes A. L., page 341), entitled "An act making appropriations for current and contingent expenses of the Indian Bureau of the Interior Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30th, 1897, and for other purposes" and by said act being authorized to negotiate with the Crow Indians, in the State of Montana, for the cession of a portion of their reservation; and whereas the Indians residing on and having rights upon the said Crow Indian Reservation in the State of Montana are willing to dispose of a portion of their surplus lands:

Now, therefore, this agreement made and entered into by and between the aforesaid commissioners on behalf of the United States of America and the head men and a majority of the male adults residing upon and having rights on the Crow Indian Reservation in the State of Montana, witnesseth:

ARTICLE I. That the said Indians of the Crow Reservation do hereby cede, grant, and relinquish to the United States all right, title, and interest which they may have to the lands embraced within and bounded by the following-described lines: Beginning at the northeast corner of the said Crow Indian Reservation; thence running due south to a point lying due east of the northeast corner of the Fort Custer Military Reservation; thence running due west to the northwest corner of said Fort Custer Military Reservation; thence due south to the southwest corner of said Fort Custer Military Reservation; thence due west to the intersection of the line between sections ten and eleven, township two south, range twenty-eight east of the principal meridian of Montana; thence due north to the intersection of the Montana base line; thence due west to the intersection of the western boundary of the Crow Indian Reservation; thence in a northeasterly direction, following the present boundary of said reservation to point of beginning.

ARTICLE II. That in consideration of the land ceded, granted, and relinquished as aforesaid, the United States stipulates and agrees to pay to and expend for the Indians of the said reservation eleven hundred and fifty thousand dollars, in the following manner, to wit:

Ninety thousand dollars, or so much thereof as may be necessary shall be expended under the direction of the Secretary of the Interior in the extension and completion, including the necessary laterals of the system of irrigation now being constructed on said reservation.

Ten thousand dollars shall be expended under the direction of the Secretary of the Interior in the building,

extension, or completion of individual Indian ditches: *Provided,* That none of the above sum shall be expended without the knowledge and consent of the Indian agent.

One hundred thousand dollars shall be placed in the Treasury of the United States to the credit of the Crow Indians as a trust fund, the same to remain in the Treasury for fifteen years, and shall draw interest at the rate of four percent per annum, said interest to be expended by the Secretary of the Interior in maintaining and managing said irrigation system.

Provided further, That at the expiration of the fifteen years above mentioned such disposition shall be made of said funds as the Indians, with the consent of the Secretary of the Interior, may determine.

Two hundred forty thousand dollars shall be expended, under the direction of the Secretary of the Interior in the purchase of two-year-old southern heifers, the same to be placed upon the Crow Indian Reservation, and added to the present herd now owned in common by the Crow tribe of Indians;

Additional amounts may be expended for cattle from time to time at the request of the Indians under the direction of the Secretary of the Interior.

Provided further, That during the year 1902 all cattle owned at that time in common by the Crow tribe of Indians shall be divided equally between said Indians, share and share alike to every man, woman, and child having rights upon the Crow Reservation.

Fifteen thousand dollars shall be spent in the purchase of jackasses or stallions, either or both, in the dis-

cretion of the Secretary of the Interior, the same to be placed upon the Crow Reservation for the benefit of the Crow Indians.

Forty thousand dollars shall be expended under the direction of the Secretary of the Interior in the purchase of two-year-old ewes, the same to be placed upon the Crow Reservation for the benefit of the Crow Indians.

Forty thousand dollars, or as much thereof as may be necessary shall be expended by the Secretary of the Interior in fencing the Crow Reservation, said fence to be built of six strands of galvanized barbed cattle wire, with either cedar posts not less than four inches in diameter at the small end or iron posts set sixteen feet apart with three metallic stays between each two posts; said fence to be well built and properly braced and anchored.

One hundred thousand dollars, or as much thereof as may be necessary, shall be expended by the Secretary of the Interior in the erection, purchase and repair of such school buildings as he may deem necessary.

Ten thousand dollars shall be expended by the Secretary of the Interior, in the erection and furnishing of a hospital at the agency for the benefit of the Crow Indians.

Fifty thousand dollars shall be placed in the Treasury of the United States to the credit of the Crow tribe of Indians as a trust fund, and shall bear interest at the rate of four percent per annum; said interest to be used, under direction of the Secretary of the Interior, to cover necessary expenses of maintaining said hospital.

Fifty thousand dollars shall be deposited in the Treasury of the United States to the credit of the Crow tribe of

Indians, the same to be expended for their benefit from time to time by the Secretary of the Interior, in such manner as he may direct.

Three thousand dollars, or as much thereof as may be necssary, is hereby appropriated and set apart to pay the expenses of ten Crow Indians, two interpreters and the agent to visit Washington at such time as permission is received from the Secretary of the Interior.

The balance of the principal sum due the Crow Indians under this agreement shall be placed in the Treasury of the United States to their credit as a trust fund and shall bear interest at the rate of four percent per annum; said interest to be added annually to the principal and an annual annuity payment of twelve dollars per capita shall be paid, in cash, to every man, woman and child having rights upon the reservation; said annuity to be semiannually in accordance with such rules and regulations as the Secretary of the Interior may prescribe.

Provided further, That two hundred thousand dollars of the last-named sum may be expended in the further purchase of cattle or sheep should a majority of the Indians so decide, and the same be approved by the Secretary of the Interior.

Provided further, That when each object for which a specific appropriation has been made in this agreement shall have been fully carried out and completed then the balance remaining of said appropriation may be expended for the benefit of the Crow tribe or placed to their credit in such manner as the Secretary of the Interior may determine.

It is further agreed that in the construction of ditches, dams, canals and fences that no contract shall be awarded; nor employment given to other than Crow Indians, or whites intermarried with them, except that any Indian employed in construction may hire white men to work for him if he so desires.

Provided further, That nothing herein contained shall be construed to prevent the employment of such engineers or other skilled employees, or to prevent the employment of white labor where it is impracticable for the Crows to perform the same.

None of the money due to the said Indians under this agreement shall be subject to the payment of any claims, judgments, [or] demands against said Indians for damages or depredations claimed to have been committed prior to the signing of this agreement.

ARTICLE III. All lands upon that portion of the reservation hereby granted, ceded and relinquished which have, prior to the date of this agreement been allotted in severalty to Indians of the Crow tribe shall be reserved for said Indians, or where any Indians have homes on such lands they shall not be removed therefrom without their consent, and those not allotted may receive allotments on the lands they now occupy. But in case any prefer to move they may select land elsewhere on that portion of said reservation not hereby ceded granted or relinquished, and not occupied by any other Indians, and should they decide not to move their improvements, then the same may be sold for their benefit, said sale to be approved by the Secretary of the Interior, and the cash proceeds shall be paid

to the Indian or Indians whose improvements shall be so sold.

ARTICLE IV. That for the purpose of segregating the ceded lands from the diminished reservation the new boundary lines described in Article I of this agreement shall, when necessary be properly surveyed and permanently marked in a plain and substantial manner by prominent and durable monuments, the cost of said survey to be paid by the United States.

ARTICLE V. The water from streams on that portion of the reservation now sold, which is necessary for irrigating on land actually cultivated, and in use, shall be reserved for the Indians now using the same so long as said Indians remain where they now live.

ARTICLE VI. It is further agreed that a statement of all expenditures under the various provisions of this agreement shall be sent to the agent of the Crow Indians twice a year, or at such times as the Secretary of the Interior may direct, showing the amounts expended and the balance remaining on hand in each of the several funds.

ARTICLE VII. The existing provisions of all former treaties with the Crow tribe of Indians not inconsistent with the provisions of this agreement, are hereby continued in force and effect, and all provisions thereof inconsistent herewith are hereby repealed.

ARTICLE VIII. This agreement shall take effect and be in force when signed by the commissioners and a majority of the male Indians of the Crow tribe over eighteen years of age, and ratified by the Congress of the United States, and should any article in the agreement fail

of confirmation by Congress, then the whole shall be null and void.

Signed on the part of the United States Government by the commissioner aforesaid and by the following Indians of the Crow tribe having rights on the Crow Reservation in the State of Montana.

CROW AGENCY, MONTANA, August 14, 1899:

CHARLES G. HOYT, Commissioner.
JAMES H. MCNEELY, Commissioner.
BENJAMIN F. BARGE, Commissioner.
PRETTY (x mark) EAGLE.
PRETTY COOS.
Two (x mark) LEGGINS.
(And 535 others.)

Witness: FRED E. MILLER

I hereby certify that I was chosen, by the Indians to act as interpreter during the councils held to discuss the foregoing agreement; that I truly interpreted for the commissioners and for the Indians, and that they thoroughly understand the entire matter.

CARL LEIDER, Interpreter.

Witness: C. N. CROTSENBURG.

We hereby certify that we were present at the councils held to discuss the foregoing agreement; that we understand the Crow language, and that the provisions of this agreement were correctly interpreted to the Indians, and that they understood the entire matter.

FRANK SHANE.
W. M. LEIGHTON.
GEORGE H. PEASE.

Witnesses:

H. J. SHOBE.
F. G. MATTOON.

CROW AGENCY, MONT., August 14, 1899.

CROW AGENCY, MONT., August 14, 1899.

I hereby certify that three hundred and seventeen Indians constitute a majority of the male adult Indians over 18 years old residing on, or having rights upon the Crow Indian Reservation, in the State of Montana.

J. E. EDWARD, United States Indian Agent.

And

Whereas: The Indians of said Crow Reservation consented to the modification of the aforesaid agreement, as evidenced by an instrument executed by them on the twenty-seventh day of April, A. D. nineteen hundred and one, in words and figures as follows:

CROW AGENCY, MONTANA, April 27, 1901.

We the undersigned members of the Crow Tribe of Indians, hereby consent and agree to the amendment of an agreement concluded with our tribe August 14th, 1899, by the addition of the following article thereto: Article IX. The right to take out water upon the diminished reservation subject to any prior claim of the Indians thereto by reason of previous appropriation, and the right to construct, maintain, and operate dams, flumes, and canals upon and across the said diminished reservation for the purpose of irrigating lands within any portion of the ceded tract, are hereby granted, such rights to be exercised by persons, companies, or corporations under such rules,

regulations, and requirements as may be prescribed by the Secretary of the Interior.

RICHARD WALLACE X
TWO LEGGINS X.
MEDICINE EAGLE X.
(and 523 more Indian signatures.)

We certify on honor that we were present and witnessed the signing of the above agreement by the adult male members of the Crow Tribe of Indians, numbered from 1 to 526.

F. G. MATTOON.
FRED E. MILLER.

I certify on honor that I interpreted the above amendments to the agreement, and the succeeding agreement, for the Indians and that they fully understood the conditions of the same, and that I witnessed the signing of same by the adult male members of the Crow Tribe of Indians, numbered from 1 to 526.

T. LAFORGE, Interpreter.

I certify on honor that the Indians whose names are attached to the above list, number from one (1) to five hundred twenty-six (526) are all adult male members of the Crow Tribe of Indians, and that each one is entitled to and does receive an equal portion of the benefits of the Crow Tribe of Indians, and are entitled to signify their willingness to the above undertaking. I further certify that three hundred twenty-three (323) Indians constitute a majority of the adult male Crow Indians having rights on the Crow Indian Reservation in the State of Montana.

J.E. EDWARDS, U.S. Indian Agent.

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same is hereby, modified and amended to read as follows:

"ARTICLE I. That the said Indians of the Crow Reservation do hereby cede, grant, and relinquish to the United States all right, title, and interest which they may have to the lands embraced within and bounded by the following-described lines: Beginning at the northeast corner of the said Crow Indian Reservation; thence running due south to a point lying due east of the northeast corner of the Fort Custer Military Reservation; thence running due west to the northwest corner of said Fort Custer Military Reservation; thence due south to the southwest corner of said Fort Custer Military Reservation; thence due west to the intersection of the line between sections ten and eleven, township two south, range twenty-eight east of the principal meridian of Montana; thence due north to the intersection of the Montana base line; thence due west to the intersection of the western boundary of the Crow Indian Reservation; thence in a northeasterly direction, following the present boundary of said reservation to point of beginning.

"ART. II. That in consideration of the land ceded, granted, relinquished, and conveyed by article one of this agreement the United States stipulates and agrees to dispose of the same as hereinafter provided under the provisions of the reclamation act approved June seventeenth, nineteen hundred and two, the homestead, town-site, and mineral land laws, except sections sixteen and thirty-six,

or an equivalent of two sections in each township, at not less than four dollars per acre, subject to the provisions in section five, the United States to pay for sections sixteen and thirty-six, or an equivalent of two sections in each township, at one dollar and twenty-five cents per acre, and to pay the said Indians the proceeds derived from the sale of said lands, and for the said sections sixteen and thirty-six, or an equivalent of two sections in each township, as follows:

"Ninety thousand dollars, or so much thereof as may be necessary, shall be expended, under the direction of the Secretary of the Interior, in the extension and completion, including the necessary laterals, of the system of irrigation now being constructed on said reservation.

"One hundred thousand dollars shall be placed in the Treasury of the United States to the credit of the Crow Indians as a trust fund, the same to remain in the Treasury for fifteen years and shall draw interest at the rate of four percentum per annum, said interest to be expended by the Secretary of the Interior in maintaining and managing said irrigation system: *Provided further*, That at the expiration of the fifteen years above mentioned such disposition shall be made of said funds as the Indians, with the consent of the Secretary of the Interior, may determine.

"Two hundred and forty thousand dollars shall be expended, under the direction of the Secretary of the Interior, in the purchase of two-year-old Southern heifers, the same to be placed upon the Crow Indian Reservation and added to the present herd now owned in common by the Crow Tribe of Indians.

"Additional amounts may be expended for cattle from time to time, at the request of the Indians, under the direction of the Secretary of the Interior.

"Fifteen thousand dollars shall be spent in the purchase of jackasses or stallions, either or both, in the discretion of the Secretary of the Interior, the same to be placed upon the Crow Reservation for the benefit of the Crow Indians.

"Forty thousand dollars shall be expended under the direction of the Secretary of the Interior in the purchase of two-year-old ewes, the same to be placed upon the Crow Reservation for the benefit of the Crow Indians.

"Forty thousand dollars, or as much thereof as may be necessary, shall be expended by the Secretary of the Interior in fencing the Crow Reservation, said fence to be built of six strands of galvanized barbed cattle wire, with either cedar posts not less than four inches in diameter at the small end or iron posts set sixteen feet apart, with three metallic stays between each two posts; said fence to be well built and properly braced and anchored.

"One hundred thousand dollars, or as much thereof as may be necessary, shall be expended by the Secretary of the Interior in the erection, purchase, and repair of such school buildings as he may deem necessary.

"Ten thousand dollars shall be expended by the Secretary of the Interior in the erection and furnishing of a hospital at the agency for the benefit of the Crow Indians.

"Fifty thousand dollars shall be placed in the Treasury of the United States to the credit of the Crow tribe of Indians as a trust fund, and shall bear interest at the rate

of four percentum per annum; said interest to be used, under the direction of the Secretary of the Interior, to cover necessary expenses of maintaining said hospital.

"Fifty thousand dollars shall be deposited in the Treasury of the United States to the credit of the Crow tribe of Indians, the same to be expended for their benefit from time to time by the Secretary of the Interior, in such manner as he may direct.

"Three thousand dollars, or as much thereof as may be necessary may be expended to pay the expenses of ten Crow Indians, two interpreters, and the agent to visit Washington as such time as permission is received from the Secretary of the Interior: *Provided further,* That should the funds accruing to the Indians from the sale of their lands render it advisable, the Secretary of the Interior may expend the further sum of two hundred thousand dollars in the further purchase of cattle or sheep, should a majority of the Indians so decide and the same be approved by the Secretary of the Interior: *Provided further,* That when each object for which a specific appropriation has been made in this agreement shall have been fully carried out and completed then the balance remaining of said appropriation may be expended for the benefit of the Crow tribe or placed to their credit in such manner as the Secretory of the Interior may determine: *Provided further,* That the Secretary of the Interior may, in his discretion, while the funds for the several purposes above named are accruing from the sale and disposition of the lands, make per capita cash payments from the proceeds as such times and in such amounts to every man, woman and child, share and share alike, having tribal rights on the reservation, as he may deem for their best interests.

"It is further agreed that in the construction of ditches, dams, canals, and fences no contract shall be awarded nor employment given to other than Crow Indians or whites intermarried with them except that any Indian employed in construction may hire white men to work for him if he so desires: *Provided further,* That nothing herein contained shall be construed to prevent the employment of such engineers or other skilled employees, or to prevent the employment of white labor where it is impracticable for the Crows to perform the same.

"That none of the money due to the said Indians under this agreement shall be subject to the payment of any claims, judgements, or demands against said Indians for damages or depredations claimed to have been committed prior to the signing of this agreement. And the various expenditures and payments required to be made under the provisions of this article shall be made as the funds therefor are available as herein provided, and shall be prorated, apportioned, and made in such proportions and amounts as in the opinion of the Secretary of the Interior the needs and requirements of the Indians and their best interests shall warrant and demand.

"ART. III. All lands upon that portion of the reservation hereby granted, ceded, and relinquished which have, prior to the date of this agreement, been allotted in severalty to Indians of the Crow tribe shall be reserved for said Indians, or where any Indians have homes on such lands they shall not be removed therefrom without their consent, and those not allotted may receive allotments on the lands they now occupy. But in case any prefer to move they may select land elsewhere on that portion of said reservation not hereby ceded, granted, or relinquished, and

not occupied by any other Indians, and should they decide not to move their improvements, then the same may be sold for their benefit, said sale to be approved by the Secretary of the Interior, and the cash proceeds shall be paid to the Indian or Indians whose improvements shall be so sold.

"ART. IV. That for the purpose of segregating the ceded lands from the diminished reservation the new boundary lines described in Artice I of this agreement shall, when necessary be properly surveyed and permanently marked in a plain and substantial manner by prominent and durable monuments, the cost of said survey to be paid by the United States.

"ART. V. The water from streams on that portion of the reservation now sold, which is necessary for irrigating land actually cultivated and in use shall be reserved for the Indians now using the same so long as said Indians remain where they now live.

"ART. VI. It is further agreed that a statement of all expenditures under the various provisions of this agreement shall be sent to the agent of the Crow Indians twice a year, or at such times as the Secretary of the Interior may direct, showing the amounts expended and the balance remaining on hand in each of the several funds.

"ART. VII. The existing provisions of all former treaties with the Crow tribe of Indians not inconsistent with the provisions of this agreement are hereby continued in force and effect, and all provisions thereof inconsistent herewith are hereby repealed.

"ART. VIII. The right to take out water upon the diminished reservation subject to any prior claim of the

Indians thereto by reason of previous appropriation, and the right to construct, maintain, and operate dams, flumes, and canals upon and across the said diminished reservation for the purpose of irrigating lands within any portion of the ceded tract are hereby granted, such rights to be exercised by persons, companies, or corporations under such rules, regulations, and requirements as may be prescribed by the Secretary of the Interior.

"ART. IX. This agreement shall take effect and be in force when accepted and ratified by the Congress of the United States."

SEC. 2. That the said agreement be, and the same is hereby. accepted, ratified, and confirmed, as herein amended.

SEC. 3. That for the purpose of surveying and marking so much of the boundary line of the tract ceded and relinquished by the Indians as may be necessary to segregate the same from the lands reserved by them, as provided in article four of said agreement, the sum of one thousand two hundred dollars, or so much thereof as may be necessary, be, and the same is hereby, appropriated out of any money in the Treasury not otherwise appropriated, and there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of forty thousand dollars, or so much thereof as may be necessary, for the completion of the survey and subdivision of said ceded lands, the same to be reimbursed out of the first moneys to be received from the sale of said lands.

SEC. 4. That the Commissioner of Indian Affairs shall cause allotments to be made, in manner and quantity as provided by existing law, of the lands occupied and cul-

tivated by any Indians on the portion of the reservation by said agreement ceded and relinquished, as required by article three thereof; and where such Indian occupants elect to remove the diminished reservation he shall cause a schedule to be prepared showing the names of such occupants, the descriptions of the lands, and the character of the improvements thereon. Such improvements shall then be appraised and sold under the direction of the Secretary of the Interior to the highest bidder, no sale to be for less than the appraised value, the proceeds to be paid to the respective Indian occupants as required by said article three: *Provided,* That the purchaser of such improvements shall have a preference right, if otherwise qualified, of thirty days after the land becomes subject to entry within which to enter the lands upon which the improvements are located, not exceeding one hundred and sixty acres, in compliance with the provisions herein governing the disposition of said ceded lands.

The Secretary of the Interior shall fix a reasonable time within which such Indian occupants shall elect whether they will remain on the ceded tract or remove to the diminished reservation, and where they elect to remove he shall also fix a reasonable time within which such occupants must remove their improvements if they should choose to do so instead of having the same appraised and sold.

SEC. 5. That before any of the lands by this agreement ceded are opened to settlement or entry the Commissioner of Indian Affairs shall cause the allotments to be made and the schedule to be prepared, as provided for in section four of this act, and a duplicate of said schedule shall be filed with the Commissioner of the General Land

Office. Upon the completion of such allotments and the filing of such schedule and after the sale or removal of such improvements the residue of such ceded lands, except sections sixteen and thirty-six, or lands in lieu thereof, which shall be reserved for common school purposes, and are hereby granted to the State of Montana for such purpose, shall be subject to withdrawal and disposition under the reclamation act of June seventeenth, nineteen hundred and two, so far as feasible irrigation projects may be found therein. The charges provided for by said reclamation act shall be in addition to the charge of four dollars per acre for the land, and shall be paid in annual installments as required under the reclamation act; and the amounts to be paid for the land shall be credited to the funds herein established for the benefit of the Crow Indians. If any lands in section sixteen and thirty-six are included in an irrigation project under the reclamation act, the State of Montana may select in lieu thereof, as herein provided, other lands not included in any such project, in accordance with the provisions of existing law concerning school land selections. In any construction work upon the ceded lands performed directly by the United States under the reclamation act, preference shall be given to the employment of Crow Indians, or whites intermarried with them, so far as may be practicable: *Provided however,* That if the lands withdrawn under the reclamation act are not disposed of within five years after the passage of this act, then all of said lands so withdrawn shall be disposed of as other lands provided for in this act. That the lands not withdrawn for irrigation under said reclamation act, which lands shall be determined under the direction of the Secretary of the Interior at the earliest practical date, shall be disposed of under the homestead, town-site, and mineral-land laws of

the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: *Provided,* That as to the lands open under such proclamation the rights of honorably discharged Union soldiers and sailors of the late Civil and Spanish War or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *And provided further,* That the price of said lands shall be four dollars, per acre, when entered under the homestead laws, to be paid as follows:

One dollar per acre when entry is made, and the remainder in four equal annual installments, the first to be paid at the end of the second year.

In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre.

Lands entered under the town-site and mineral-land laws shall be paid for in an amount and manner as provided by said laws, but in no event at a less price than that fixed herein for such lands, if entered under the homestead laws, and in case any entryman fails to make such deferred

payments, or any of them, promptly when due, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be held for cancellation and canceled: *Provided,* That the lands embraced within such canceled entry shall, after cancellation of such entry, be subject to entry under the provisions of the homestead law at four dollars per acre until otherwise directed by the President, as herein provided: *And provided,* That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made, except as to lands entered under said reclamation act: *And provided further,* That when, in the judgment of the President, no more of the land herein ceded can be disposed of at said price, he may by proclamation, to be repeated at his discretion, sell from time to time the remaining land subject to the provisions of the homestead law or otherwise as he may deem most advantageous, as such price or prices, in such manner, upon such conditions, with such restrictions, and upon such terms as he may deem best for all the interests concerned.

SEC. 6. That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and paid to the Crow Indians or expended on their account only as provided in article two of said agreement as herein amended.

No lands in sections sixteen and thirty-six now occupied, as set forth in article three of the agreement herein ratified, or withdrawn for irrigation under the provisions of said reclamation act, shall be reserved for school pur-

poses, but the State of Montana shall be entitled to indemnity for any lands so occupied; and the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized in the tract herein ceded to locate other lands not occupied or withdrawn, which shall be paid for by the United States, as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement, but no selection shall be made by the State of the lands herein ceded except to compensate for losses occurring therein.

SEC. 7 That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of ninety thousand dollars, or so much thereof as may be necessary, to pay the said Indians, at the rate of one dollar and twenty-five cents per acre, for the lands granted to the State of Montana as provided in section five of this act.

SEC. 8. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided.

Approved April 27, 1904.

12. Act of February 17, 1917, 39 Stat. 944 (codified in 30 U.S.C. §§ 86-89)

§ 86. *Disposition of lands in Indian reservations with reservation of coal; examination and appraisal of lands*

In any Indian reservation opened to settlement and entry pursuant to a classification of the surplus lands therein as mineral and nonmineral, such surplus lands not otherwise reserved or disposed of, which have been or may be withdrawn or classified as coal lands or are valuable for coal deposits, shall be subject to the same disposition as is or may be prescribed by law for the nonmineral lands in such reservation whenever proper application shall be made with a view of obtaining title to such lands, with a reservation to the United States of the coal deposits therein and of the right to prospect for, mine, and remove the same. Such surplus lands, prior to any disposition hereunder, shall be examined, separated into classes the same as are the nonmineral lands in such reservations, and appraised, as to their value, exclusive of the coal deposits therein, under such rules and regulations as shall be prescribed by the Secretary of the Interior for that purpose. (Feb. 27, 1917, c. 133,§ 1, 39 Stat. 944.)

§ 87. *Statements in application; patents*

Any applicant for lands mentioned in section 86 of this title shall state in his application that the same is made in accordance with and subject to the provisions and reservations of sections 86 to 89 of this title, and upon submission of satisfactory proof of full compliance with the provisions of law under which application or entry is made and of sections 86 to 89 of this title shall be entitled to a patent

to the lands applied for and entered by him, which patent shall contain a reservation to the United States of all the coal deposits in the lands so patented, together with the right to prospect for, mine, and remove the same.

(Feb. 27, 1917, c. 133, § 2, 39 Stat. 945.)

§ 88. *Disposition of coal by United States*

If the coal-land laws have been or shall be extended over lands applied for, entered, or patented hereunder the coal deposits therein shall be subject for disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal. Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right at all times to enter upon the lands applied for, entered, or patented under sections 86 to 89 of this title, for the purpose of prospecting for coal thereon, if such coal deposits are then subject to disposition, upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal deposits in any such lands, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages. The owner under such limited patent shall have the right to mine coal for personal use upon the land for domestic purposes at any time prior to the disposal by the United

States of the coal deposits. Nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications made under the applicable land laws of the United States for any such surplus lands which have been or may be classified as coal lands with a view of disproving such classification and securing a patent without reservation.

(Feb. 27, 1917, c. 133, § 3, 39 Stat. 945.)

§ 89. *Disposition of proceeds*

The net proceeds derived from the sale and entry of surplus lands in conformity with the provisions of section 86 to 89 of this title shall be paid into the Treasury of the United States to the credit of the same fund under the same conditions and limitations as are or may be prescribed by law for the disposition of the proceeds arising from the disposal of other surplus lands in such Indian reservation. The provisions of sections 86 to 89 of this title shall not apply to the lands of the Five Civilized Tribes of Indians in Oklahoma.

(Feb. 27, 1917, c. 133, § 4, 39 Stat. 945.)

13. Act of June 4, 1920, 41 Stat. 751 (Sections 1 and 6)

An Act To provide for the allotment of lands of the Crow Tribe, for the distribution of tribal funds, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he hereby is, authorized and directed to cause to be alloted the surveyed lands and such unsurveyed lands as the commission hereinafter provided for many find to be suitable for allotment, within the Crow Indian Reservation in Montana (not including the Big Horn and Pryor Mountains, the boundaries whereof to be determined by said commission with the approval of the Secretary of the Interior) and not herein reserved as hereinafter provided, among the members of the Crow Tribe, as follows namely, one hundred and sixty acres to the heirs of every enrolled member, entitled to allotment, who died unallotted after December 31, 1905, and before the passage of this Act; next, one hundred and sixty acres to every allotted member living at the date of the passage of this Act, who may then be the head of a family and has not received allotment as such head of a family; and thereafter to prorate the remaining unallotted allotable lands and allot them so that every enrolled member living on the date of the passage of this Act and entitled to allotment shall receive in the aggregate an equal share of the allotable tribal lands for his total allotment of land of the Crow Tribe. Allotments made hereunder shall vest title in the allottee subject only to existing tribal leases, which leases in no event shall be renewed or extended by the Secretary of the Interior after the passage

of this Act, and shall as hereinafter provided be evidenced by patents in fee to competent Indians, except as to homesteads as hereinafter provided, but by trust patent to minors and incompetent Indians, the force and legal effect of the trust patents to be as is prescribed by the General Allotment Act of February 8, 1887 (Twenty-fourth Statutes, page 388). Priority of selection, up to three hundred and twenty acres, is hereby given to the members of the tribe who have as yet received no allotment on the Crow Reservation, and thereafter all members enrolled for allotment hereunder shall in all respects be entitled to equal rights and privileges, as far as possible, in regard to the time, manner, and amount of their respective selections: *Provided*, That Crow Indians who are found to be competent may elect, in writing, to have their allotments, except as herein provided, patented to them in fee. Otherwise trust patents shall be issued to them. No patent in fee shall be issued for homestead lands of a husband unless the wife joins in the application, who shall be examined separately and apart from her husband and a certificate of the officer taking her acknowledgment shall fully set forth compliance with this requirement.

* * * *

SEC. 6. That any and all minerals, including oil and gas, on any of the lands to be allotted hereunder are reserved for the benefit of the members of the tribe in common and may be leased for mining purposes, upon the request of the tribal council under such rules, regulations, and conditions as the Secretary of the Interior may prescribe, but no lease shall be made for a longer period than ten years, but the lessees shall have the right to renewal there-

of for a further period of ten years upon such terms and conditions as the Secretary of the Interior may prescribe: *Provided, however,* That allotments hereunder may be made of lands classified as valuable chiefly for coal or other minerals which may be patented as herein provided with a reservation, set forth in the patent, of the coal, oil, gas, or other mineral deposits for the benefit of the Crow Tribe: *And provided further,* That at the expiration of fifty years from the date of approval of this Act unless otherwise ordered by Congress the coal, oil, gas, or other mineral deposits upon or beneath the surface of said allotted lands shall become the property of the individual allottee or his heirs.

14. Act of May 19, 1926, 44 Stat. 566

An Act To allot lands to living children on the Crow Reservation, Montana.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized to allot lands in severalty to children of the Crow Tribe, now living, not heretofore allotted, from any suitable lands belonging to the tribe now available for allotments, or which may become available, including any Crow lands heretofore opened to entry and sale: *Provided,* That the areas allotted shall be as authorized by the General Allotment Act of February 8, 1887 (Twenty-fourth Statutes at Large, page 388), as amended.

SEC. 2. All minerals, including oil and gas, on any of the lands allotted hereunder are reserved to the tribe, and may be leased for mining purposes in the same manner as other allotted lands of the reservation on which the mineral rights are so reserved: *Provided,* That the form of patent shall be as prescribed in the general allotment laws, and there shall be included therein all liens and other charges against these allotments the same as provided in the Crow Allotment Act of June 4, 1920 (Forty-first Statutes at Large, page 751).

SEC. 3. There is hereby authorized to be appropriated the sum of $5,000, or so much thereof as may be necessary, of the tribal funds of the Crow Indians of the State of Montana for surveys and other expenses connected with the allotments to be made hereunder.

Approved, May 19, 1926.

15. Act of May 26, 1926, 44 Stat. 658 (Sections 1 and 6)

An Act To amend sections 1, 5, 6, and 18 of an Act approved June 4, 1920, entitled "An Act to provide for the allotment of lands of the Crow Tribe, for the distribution of tribal funds and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first, fifth, sixth, eighth, and eighteenth sections of an Act providing for the allotment of lands of the Crow Tribe, for the distribution of tribal funds, and for other purposes, approved June 4, 1920 (Forty-first Statutes at Large, pages 751-757), be amended to read as follows:

"SECTION 1. That the Secretary of the Interior be, and he hereby is, authorized and directed to cause to be allotted the surveyed lands and such unsurveyed lands as the commission hereinafter provided for may find to be suitable for allotment, within the Crow Indian Reservation in Montana (not including the Big Horn and Pryor Mountains, the boundaries whereof to be determined by said commission with the approval of the Secretary of the Interior), and not herein reserved as hereinafter provided, among the members of the Crow Tribe, as follows, namely, one hundred and sixty acres to the heirs of every enrolled member, entitled to allotment, who died unallotted after December 31, 1905, and before the passage of this Act; next, one hundred and sixty acres to every allotted member living at the date of the passage of this Act, who may then be the head of a family and has not received allotment as such head of a family; and thereafter to prorate the remaining unallotted allotable lands and allot them

so that every enrolled member living on the date of the passage of this Act and entitled to allotment shall receive in the aggregate an equal share of the allotable tribal lands for his total allotment of land of the Crow Tribe. Allotments made hereunder shall vest title in the allottee subject only to existing tribal leases, which leases in no event shall be renewed or extended by the Secretary of the Interior after the passage of this Act, and shall as hereinafter provided be evidenced by patents in fee to competent Indians, except as to homesteads as hereinafter provided, but by trust patent to minors and incompetent Indians, the force and legal effect of the trust patents to be as is prescribed by the General Allotment Act of February 8, 1887, as amended (Twenty-fourth Statutes at Large, page 388). Priority of selection, up to three hundred and twenty acres, is hereby given to the members of the tribe who have as yet received no allotment on the Crow Reservation, and thereafter all members enrolled for allotment hereunder shall in all respects be entitled to equal rights and privileges, as far as possible, in regard to the time, manner, and amount of their respective selections: *Provided,* That Crow Indians, who are found to be competent, may elect, in writing, to have their allotments, except as herein provided, patented to them in fee. Otherwise trust patents shall be issued to them. No patent in fee shall be issued for homestead lands of a husband unless the wife joins in the application, who shall be examined separately and apart from her husband and a certificate of the officer taking her acknowledgment shall fully set forth compliance with this requirement: *Provided further,* That any allottee classified as competent may lease his or her allotment or any part thereof and the allotments of minor children for farming

and grazing purposes. Any adult incompetent Indian with the approval of the superintendent may lease his or her allotment or any part thereof and the allotments of minor children for farming or grazing purposes. The allotments of orphan minors shall be leased by the superintendent. Moneys received for or on behalf of all incompetent Indians and minor children shall be paid to the superintendent by the lessee for the benefit of said Indians. No lease shall be made for a period no longer than five years. All leases made under this section shall be recorded at the Crow Agency.

* * *

"SEC. 6. That any and all minerals, including oil and gas, on any of the lands to be allotted hereunder are reserved for the benefit of the members of the tribe in common and may be leased for mining purposes, with the consent of the tribal council under such rules, regulations, and conditions as the Secretary of the Interior may prescribe, but no lease shall be made for a longer period than ten years, but the lessees may have the right to renewal thereof for a further period of ten years upon such terms and conditions as the Secretary of the Interior may prescribe, and agreed to by said tribal council: *Provided,* That when any land is leased for mining purposes and development thereunder shall indicate the presence of minerals including oil and gas in paying quantities, the lessee or lessees shall proceed with all reasonable diligence to complete the development under said lease to extract the mineral including oil and gas from the land leased and to bring the product mined or extracted into market as speedily as possible unless the extraction and sale thereof be withheld with the consent of the Crow Tribe of Indians: *Provided,*

however, That allotments hereunder may be made of lands classified as valuable chiefly for coal or other minerals which may be patented as herein provided with a reservation, set forth in the patent, of the coal, oil, gas, or other mineral deposits for the benefit of the Crow Tribe: *And provided further,* That at the expiration of fifty years from the date of approval of this Act, unless otherwise ordered by Congress, the coal, oil, gas, or other mineral deposits upon or beneath the surface of said allotted lands shall become the property of the individual allottee or his heirs.

16. Act of May 2, 1928, 44 Stat. 482

An Act To amend an Act to allot lands to children on the Crow Reservation, Montana.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of an Act entitled "An Act to allot lands to living children on the Crow Reservation, Montana," approved May 19, 1926 (Forty-fourth Statutes at Large, page 566), is hereby amended to read as follows:

"That the Secretary of the Interior is hereby authorized to allot lands in severalty to children of the Crow Tribe, now living, not heretofore allotted, from any suitable lands belonging to the tribe now available for allotments or which may become available, including any Crow lands heretofore opened to entry and sale, and to allot land to children, hereafter born so long as there are lands of said tribe available for allotment purposes: *Provided,* That the areas allotted shall be as authorized by the General Allotment Act of February 8, 1887 (Twenty-fourth Statutes at Large, page 388), as amended."

Approved, May 2, 1928.

17. Act of August 31, 1937, 50 Stat. 884

AN ACT

Relating to certain lands within the boundaries of the Crow Reservation, Montana.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all of that area within the Crow Indian Reservation, Montana, described as: "Beginning at the northwest corner of lot eleven, section 3; thence east along the north boundary line of the Crow Indian Reservation to the west meander line of the Big Horn River; thence southeasterly along the west meander line of the said Big Horn River to its intersection with the north and south center line of section twelve; thence south along the said center line of sections twelve and thirteen to the center of section thirteen; thence west to the northwest corner of the northeast quarter of the southwest quarter of said section thirteen; thence south to the southeast corner of the northwest quarter of the northwest quarter of section twenty-five; thence west to the northwest corner of lot two, section twenty-seven; thence north along the boundary line of the Crow Indian Reservation to the point of beginning, all in township I south, range 33 east, principal meridian, Montana, be, and the same is hereby, eliminated and excluded from the Crow Indian Reservation in the State of Montana.

SEC. 2. Nothing contained in this Act shall be construed to discontinue or repeal the provisions of the Indian liquor laws which prohibit the sale, gift, barter, exchange, or other disposition of beer, wine, and other liquors to In-

dians of the classes set forth in the Act of January 30, 1897 (29 Stat. L. 506; U.S.C., title 25, sec. 241).

SEC. 3. All Acts or parts of Acts in conflict herewith are hereby repealed.

Approved, August 31, 1937.

18. Act of May 11, 1938, 52 Stat. 347 (codified as amended in 25 U.S.C. §§ 396a-396g)

§ 396a. *Leases of unalloted lands for mining purposes—Duration of leases*

Hereafter unalloted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those hereinafter specifically excepted from the provisions of this Act [25 USCS §§ 396a and note-396g], may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesman for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

(May 11, 1938, c. 198, § 1, 52 Stat. 347.)

§ 396b. *Public auction of oil and gas leases—Requirements*

Leases for oil-and/or gas-mining purposes covering such unallotted lands shall be offered for sales to the highest responsible bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: Provided, That the foregoing provisions shall in no manner restrict the

right of tribes organized and incorporated under sections 16 and 17 of the Act of June 18, 1934 (48 Stat. 984) [25 USCS §§ 476, 477], to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to the Act of June 18, 1934 [25 USCS §§ 461-463, 464, 465, 466-470, 471-473, 474, 475, 476-478, 479].

(May 11, 1938, c. 198, § 2, 52 Stat. 347.)

§ 396c. *Lessees of restricted lands to furnish bonds for performance*

On and after May 11, 1938, lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds, in amounts satisfactory to the Secretary of the Interior, guaranteeing compliance with the terms of their leases: *Provided,* That personal surety bonds may be accepted where the sureties deposit as collateral with the said Secretary of the Interior any public-debt obligations of the United States guaranteed as to principal and interest by the United States equal to the full amount of such bonds, or other collateral satisfactory to the Secretary of the Interior, or show ownership to unencumbered real estate of a value equal to twice the amount of the bonds.

(May 11, 1938, c. 198, § 3, 52 Stat. 348.)

§ 396d. *Rules and regulations governing operations—Limitations on oil or gas leases*

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of this [25 USCS §§ 396a and note-396g] or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulagated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued

under the provisions of this Act [25 USCS §§ 396a and note-396g] shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

(May 11, 1938, c. 198, § 4, 52 Stat. 348.)

§ 396e. *Officials authorized to approve leases*

The Secretary of the Interior may, in his discretion, authorize, superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted.

(May 11, 1938, c. 198, § 5, 52 Stat. 348.)

§ 396f. *Lands excepted from leasing provisions*

Sections 1, 2, 3, and 4 of this Act [25 USCS §§ 396a-396d] shall not apply to the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma.

(May 11, 1938, c. 198, § 6, 52 Stat. 348; May 27, 1955, c. 106, § 2, 69 Stat. 68.)

§ 396g. *Lease of lands for subsurface storage of oil and gas*

The Secretary of the Interior, to avoid waste or to promote the conservation of natural resources or the welfare of the Indians, is hereby authorized in his discretion to approve leases of lands that are subject to lease under section 1 of this Act [25 USCS § 396a] or the Act of March 3, 1909 (35 Stat. 783, 25 U.S.C. 396) [25 USCS § 396], for the

subsurface storage of oil and gas, irrespective of the lands from which initially produced, and the Secretary is hereby authorized, in order to provide for the subsurface storage of oil and gas, to approve modifications, amendments, or extensions of the oil and gas or other mining lease(s), if any, in effect as to restricted Indian lands, tribal or allotted, and may promulgate rules and regulations consistent with such leases, modifications, amendments, and extensions, relating to the storage of oil or gas thereunder. Any such leases may provide for the payment of a storage fee or rental on such stored oil or gas or, in lieu of such fee or rental, for a royalty other than that prescribed in the lease when such stored oil or gas is produced in conjunction with oil or gas not previously produced. It may be provided that any oil and gas lease under which storage of oil or gas is so authorized shall be continued in effect at least for the period of such storage use and so long thereafter as oil or gas not previously produced is produced in paying quantities.

(May 11, 1938, c. 198, § 8, as added Aug. 1, 1956, c. 808, 70 Stat. 774.)

19. Act of May 19, 1958, 72 Stat. 121

An Act to provide for the restoration to tribal ownership of all vacant and undisposed-of ceded lands on certain Indian reservations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

All lands now or hereafter classified as vacant and undisposed-of ceded lands (including townsite lots) on the following named Indian reservations are hereby restored to tribal ownership, subject to valid existing rights:

Reservation and State	Approximate Acreage
Klamath River, California	159.57
Coeur D'Alene, Idaho	12,877.65
Crow, Montana	10,260.65
Fort Peck, Montana	41,450.13
Spokane, Washington	5,451.00

Provided, That such restoration shall not apply to any lands while they are within reclamation projects heretofore authorized.

Sec. 2. Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made a part of the existing reservations for such tribe or tribes.

Sec. 3. The lands restored to tribal ownership by this Act may be sold or exchanged by the tribe with the approval of the Secretary of the Interior.

Approved May 19, 1958.

20. Act of August 14, 1958, 72 Stat. 575 (relevant portions of section 1 and sections 2-4)

AN ACT

To provide compensation to the Crow Tribe of Indians for certain ceded lands embraced within and otherwise required in connection with the Huntley reclamation project, Montana, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) there is hereby authorized to be transferred in the Treasury of the United States from funds now or hereafter made available to the Bureau of Reclamation and to be placed to the credit of the Crow Tribe of Indians, Montana, and expended for its benefit and the benefit of its members, pursuant to existing law, a sum of money determined as provided in this section for terminating and extinguishing all of the right, title, estate, and interest, except minerals including oil and gas, of said Indian tribe in and to the lands of that part of the former Crow Indian Reservation lying within the bounadries described below. The Secretary of the Interior shall appraise the fair market value of the interest in the lands taken by this Act within ninety days after passage of this Act and offer that sum to the Crow Tribe. The Crow Tribe may also appraise the fair market value of the interest in the lands taken by this Act and determine whether the appraisal of the Secretary of the Interior is acceptable to the Crow Tribe. If the offer of the Secretary of the Interior is not accepted within sixty days, the Secretary or the Crow Tribe is authorized to commence in a court of competent jurisdiction an action for determining the just compensation payable for such taking. The fair

market value of, and the just compensation payable for, the Indian interest in the lands taken by this Act shall not include any value attributable to the construction and development by the United States of the Huntley reclamation project.

* * * *

(b) There is hereby authorized to be transferred in the Treasury of the United States from funds now or hereafter made available to the Bureau of Reclamation and to be placed to the credit of the Crow Tribe of Indians a sum equal to all net revenues collected by the United States from grazing and agricultural leases on and other uses of the undisposed of ceded Crow lands referred to in subsection (a) of this section between 1904 and the date of this Act, together with interest which would have been earned in accordance with law on such revenues had they been deposited in the trust funds of the Tribe, as received: *Provided,* That such transfer shall not affect the credit of any part of such revenues to the repayment obligation of the Huntley Irrigation District as provided in its contract with the United States dated January 2, 1927.

SEC. 2. All unentered and vacant lands within the area described in section 1 hereof, are hereby restored to the public domain for administration, use, occupancy, and disposal under the reclamation and public-land laws of the United States, and shall not be subject to any other law with respect to Indian ceded lands: *Provided,* That the minerals reserved for the benefit of the Crow Tribe pursuant to section 1 hereof shall be leased or otherwise disposed of under the laws and regulations relating to Indian trust lands.

SEC. 3. The sum transferred to the credit of the Crow Tribe of Indians as aforesaid and the expenses of carrying out the provisions of this Act shall be nonreimbursable and nonreturnable under the reclamation laws of the United States. The net proceeds derived from the disposal of said lands shall be covered into the general fund of the Treasury or into the reclamation fund as the Secretary of the Interior shall find appropriate in the light of the source from which the funds transferred or expended in carrying out this Act are derived.

SEC. 4. The Secretary of the Interior is authorized to perform any and all acts to carry out the provisions and purposes of this Act.

Approved August 14, 1958.

21. Act of September 16, 1959, 73 Stat. 565

An Act to grant minerals, including oil and gas, on certain lands in the Crow Indian Reservation, Montana, to certain Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Section 6 of the Act of June 4, 1920 (41 Stat. 751), as amended by the Act of May 26, 1926 (44 Stat. 658), is hereby amended to read as follows:

"Sec. 6. (a) Any and all minerals, including oil and gas, on any of the lands to be allotted hereunder are reserved for the benefit of the members of the tribe in common and may, with the consent of the tribal council, be leased for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396 a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe: *Provided,* That when any land is leased for mining purposes and development thereunder shall indicate the presence of minerals, including oil and gas, in paying quantities, the lessee or lessees shall proceed with all reasonable diligence to complete the development under said lease to extract the mineral, including oil and gas, from the land leased and to bring the product mined or extracted into market as speedily as possible unless the extraction and sale thereof be withheld with the consent of the Crow Tribe of Indians: *Provided further,* That allotments hereunder may be made of lands classified as valuable chiefly for coal or other minerals which may be patented as herein provided

with a reservation, set forth in the patent, of the coal, oil, gas, or other mineral deposits for the benefit of the Crow Tribe: *Provided further,* That at the expiration of fifty years from the date of approval of this Act, unless otherwise ordered by Congress, the coal, oil, gas, or other mineral deposits upon or beneath the surface of said allotted lands shall become the property of the individual allottee or his heirs or devisees, or their heirs or devisees, subject to any outstanding leases, regardless of any prior conveyance by such allottee, heirs, or devisees of the lands overlying such minerals and regardless of the form of reference in such conveyance, or lack of reference, to the minerals reserved by this Act and made subject to further order of Congress.

"(b) Title to the minerals so granted shall be held by the United States in trust for the Indian owners, except that if upon the expiration of said fifty years, the entire Indian interest in the minerals within any allotment or parcel thereof is granted by this Act to a person or persons who at that time hold an unrestricted title to the lands overlying such minerals, then the Secretary of Interior shall be fee patent transfer to such person or persons the unrestricted fee simple title to such minerals, which title shall vest in such person or persons as of the date of the patent."

Approved September 16, 1959.

22. Act of May 17, 1968, 82 Stat. 123

An Act to grant minerals, including oil and gas, on certain lands in the Crow Indian Reservation, Montana, to certain Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Section 6 of the Act of June 4, 1920 (41 Stat. 751), as amended by the Act of May 26, 1926 (44 Stat. 658), as further amended by the Act of September 16, 1959 (73 Stat. 565), is hereby amended to read as follows:

"Sec. 6. (a) Any and all minerals, including oil and gas, on any of the lands to be allotted hereunder are reserved in perpetuity for the benefit of the members of the tribe in common and may, with the consent of the tribal council be leased for mining purposes in acordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe: *Provided,* That leases entered into pursuant to section 6 of the Act of June 4, 1920 (41 Stat. 751), as amended by the Act of May 26, 1926 (44 Stat. 658), may with the consent of the tribal council and under such rules, regulations, and conditions as the Secretary of the Interior may prescribe, be renegotiated and amended to change the terms thereof to ten years and as long thereafter as minerals are produced in paying quantities."

Approved May 17, 1968.

23. Relevant Provisions of Title 25, Part 211 of the 1987 Code of Federal Regulations

§ 211.1 *Definitions.*

(a) The term "superintendent" in this part refers to the superintendent or other officer of the Bureau of Indian Affairs or of the Government who may have jurisdiction over the lands involved.

(b) The term "supervisor" in this part refers to a representative of the Secretary of the Interior, under direction of the United States Geological Survey, authorized and empowered to supervise and direct operations under oil and gas or other mining leases, to furnish scientific and technical information and advice, to ascertain and record the amount and value of production, and to determine and record rentals and royalties due and paid.

CROSS REFERENCE: For rules and regulations of the Geological Survey, see 30 CFR Chapter II.

§ 211.2 *Leases to be made by tribes.*

Indian tribes, bands or groups may, with the approval of the Secretary of the Interior or his authorized representative, lease their land for mining purposes. No oil and gas lease shall be approved unless it has first been offered at an advertised sale in accordance with § 211.3. Leases for minerals other than oil and gas shall be advertised for bids as prescribed in § 211.3 unless the Commissioner grants to the Indian owners written permission to negotiate for a lease. Negotiated leases, accompanied by proper bond and other supporting papers, shall be filed

with the Superintendent of the appropriate Indian Agency within 30 days after such permission shall have been granted by the Commissioner to negotiate the lease. The appropriate Area Director is authorized in proper cases to grant a reasonable extension of this period prior to its expiration. The right is reserved to the Secretary of the Interior to direct that negotiated leases be rejected and that they be advertised for bids. All leases shall be approved by the Secretary of the Interior or his duly authorized representative.

[23 FR 9393, Dec. 4, 1958. Redesigned at 47 FR 13327, Mar. 30, 1982]

§ 211.3 *Sale of oil and gas leases.*

(a) At such times and in such manner as he may deem appropriate, after being authorized by the tribal council or other authorized representative of the tribe, the superintendent shall publish notices at least thirty days prior to the sale, unless a shorter period is authorized by the Commissioner of Indian Affairs, that oil and gas leases on specific tracts, each of which shall be in a reasonably compact body, will be offered to the highest responsible bidder for a bonus consideration, in addition to stipulated rentals and royalties. Each bid must be accompanied by a cashier's check, certified check or postal money order, payable to the payee designated in the invitation to bid, in an amount not less than 25 percent of the bonus bid. Within 30 days after notification of being the successful bidder, said bidder must remit the balance of the bonus, the first year's rental, and his share of the advertising costs, and shall file with the superintendent the lease in completed form. The superintendent may, for

good and sufficient reasons, extend the time for the completion and submission of the lease form, but no extension shall be granted for remitting the balance of moneys due. If the successful bidder fails to pay the full consideration within said period, or fails to file the completed lease within said period or extension thereof, or if the lease is disapproved through no fault of the lessor or the Department of the Interior, 25 percent of the bonus bid will be forfeited for the use and benefit of the Indian lessor.

(b) All notices or advertisements of sales of oil and gas leases shall reserve to the Secretary of the Interior the right to reject all bids when in his judgment the interests of the Indians will be best served by so doing, and that if no satisfactory bid is received, or if the accepted bidder fails to complete the lease, or if the Secretary of the Interior shall determine that it is unwise in the interests of the Indians to accept the highest bid, the Secretary may readvertise such lease for sale, or if deemed advisable, with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations. The successful bidder or bidders will be required to pay his or their share of the advertising costs. Amounts received from unsuccessful bidders will be returned; but when no bid is accepted on a tract, the costs of advertising will be assessed against the applicant who requested that said tract be advertised.

[22 FR 10588, Dec. 24, 1957, as amended at 23 FR 7068, Sept. 12, 1958. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 211.3a *Leases for subsurface storage of oil or gas.*

(a) The Secretary of the Interior, or his authorized representative, may approve, subject to obtaining the prior consent of the Indian owners, storage leases, or modifications, amendments, or extensions of oil and gas or other mining leases, on tribal lands subject to lease under the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a), and on allotted lands subject to lease under the Act of March 3, 1909 (35 Stat. 783; 25 U.S.C. 396), to provide for the subsurface storage of oil or gas, irrespective of the lands from which production is initially obtained. The storage lease, or modification, amendment, or extension, shall provide for the payment of such storage fee or rental on such oil or gas as may be determined adequate in each case, or, in lieu thereof, for a royalty other than that prescribed in the oil and gas lease when such stored oil and gas is produced in conjunction with oil or gas not previously produced.

(b) The Secretary of the Interior or his authorized representative may approve, subject to obtaining the prior consent of the Indian owners, a provision in an oil and gas lease, under which storage of oil and gas is authorized, for continuance of the lease at least for the period of such storage use and so long thereafter as oil or gas not previously produced is produced in paying quantities.

(c) Applications for subsurface storage of oil or gas shall be filed in triplicate with the oil and gas supervisor and shall disclose the ownership of the lands involved, the parties in interest, the storage fee, rental, or royalty offered to be paid for such storage, and all essential information showing the necessity for such proj-

ect. Enough copies of the final agreement signed by the Indian owners and other parties in interest shall be submitted for the approval of the Secretary, or his authorized representative, to permit retention of five copies by the Department after approval.

[25 FR 9836, Oct. 14, 1960. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 211.4 *Government employees cannot acquire leases.*

No lease, assignment thereof, or interest therein will be approved to any employee or employees of the United States Government whether connected with the Bureau of Indian Affairs or otherwise, and no employee of the Interior Department shall be permitted to acquire any interest in any mineral lease covering restricted Indian lands by ownership of stock in corporations having such leases or in any other manner.

(R.S. 2078; 25 U.S.C. 68)

§ 211.5 *Corporations and corporate information.*

If the applicant for a lease is a corporation, it shall file evidence of authority of its officers to execute papers; and with its first application it shall also file a certified copy of its articles of incorporation, and, if foreign to the State in which the lands are located, evidence showing compliance with the corporation laws thereof. Statements of changes in officers and stockholders shall be furnished by a corporation lessee to the superintendent January 1 of each year, and at such other times as may be requested. Whenever deemed advisable in any case the superintendent may require a corporation applicant or lessee to file:

(a) Lists of officers, principal stockholders, and directors, with post-office addresses and number of shares held by each.

(b) A sworn statement of the proper officer showing:

(1) The total number of shares of the capital stock actually issued and the amount of cash paid into the treasury on each share sold; or, if paid in property, the kind, quantity, and value of the same paid per share.

(2) Of the stock sold, how much remains unpaid and subject to assessment.

(3) The amount of cash the company has in its treasury and elsewhere.

(4) The property, exclusive of cash, owned by the company and its value.

(5) The total indebtedness of the company and the nature of its obligations.

(6) Whether the applicant or any person controlling, controlled by or under common control with the applicant has filed any registration statement, application for registration, prospectus or offering sheet with the Securities and Exchange Commission pursuant to the Securities Act of 1933 or the Securities Exchange Act of 1934 or said Commission's rules and regulations under said acts; if so, under what provisions of said acts or rules and regulations; and what disposition of any such statement, application, prospectus or offering sheet has been made.

(c) Affidavits of individual stockholders, setting forth in what corporations or with what persons, firms, or associations such individual stockholders are interested in mining leases on restricted lands within the State, and whether they hold such interests for themselves or in trust.

CROSS REFERENCE: For rules and regulations of the Securities and Exchange Commission, see 17 CFR Chapter II.

§ 211.6 *Bonds.*

(a) Lessee shall furnish with each lease a bond (Form 5-154b), and an assignee of a lease shall furnish with each assignment a bond (Form 5-154m), with an acceptable company authorized to act as sole surety, or with two or more personal sureties and a deposit as collateral security of any public-debt obligations of the United States guaranteed as to principal and interest by the United States, equal to the full amount of such bonds, or other collateral satisfactory to the Secretary of the Interior, or show ownership of unencumbered real estate of the value equal to twice the amount of the bonds. Lessee may file a bond on Form 5-154a without sureties and a deposit as collateral security of Government bonds equal in value to the full amount of the bond. Lease bonds shall not be less than the following amounts:

For less than 80 acres	$1,000
For 80 acres and less than 120 acres	1,500
For 120 acres and not more than 160 acres	2,000
For each additional 40 acres, or part thereof, above 160 acres	500

Provided, That for leases for minerals other than oil and gas the Secretary of the Interior or his authorized representative with the consent of the Indian landowner may authorize a bond for a lesser amount if, in his opinion, the circumstances warrant and the interests of the Indian landowners are fully protected: *Provided further,* That a lessee may file one bond (Form 5-154f), in the sum of $15,000 for all leases of minerals, in any one State and which may also include leases on that part of an Indian reservation extending into State contiguous thereto, to which the lessee may become a party: *And provided further,* That the total acreage covered by the bond shall not exceed 10,240 acres.

(b) In lieu of the bonds required under paragraph (a) of this section, a lessee may furnish a bond (Form 5-156) in the sum of $75,000 for full nationwide coverage with an acceptable company authorized to act as sole surety to cover all oil and gas leases and oil and gas prospecting permits without geographic or acreage limitation to which the lessee or permittee is or may become a party.

(c) The right is specifically reserved to increase the amount of bonds and the collateral security prescribed in paragraph (a) of this section in any particular case when the officer in charge deems it proper to do so. The nationwide bond may be increased at any time in the discretion of the Secretary of the Interior.

[22 FR 10588, Dec. 24, 1957, as amended at 26 FR 164, Jan. 10, 1961. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 211.7 *Lessees to furnish additional information.*

The superintendent may, either before or after approval of a lease, call for any additional information de-

sired to carry out the regulations in this part. If a lessee shall fail to furnish the papers necessary to put his lease and bond in proper form for consideration, the superintendent shall forward such lease for disapproval.

§ 211.8 *Lands to be in compact body.*

The area covered by a lease shall be in a reasonably compact body and shall conform to the system of public-land surveys, except that leases covering lode ground may consist of one or more adjoining parallelograms 1,500 feet in length by 600 feet in width, as provided by the United States mining laws. No lease under the regulations in this part shall convey any extralateral rights, and no coal lease shall have a length exceeding 1 mile along the outcrop.

§ 211.9 *Acreage limitation.*

A lessee may acquire more than one lease but no single lease shall be granted for mining purposes on Indian tribal or restricted Indian lands, exclusive of Osage and Quapaw lands, in excess of the following acreage except were the rule of approximation applies:

(a) For oil and gas and all other minerals, except coal, 2,560 acres.

(b) (1) For coal, a lease shall ordinarily be limited to 2,560 acres. The Commissioner may, however, upon application, approve the combining of leases held by one or more lessees, or approve the issuance of a single lease for more than 2,560 acres in a reasonably compact form, if he shall find that the approval of such larger acreage is in the interest of the lessor and is necessary to permit the establishment or construction of thermal electric power plans or other industrial facilities on or near the reservation. He

may prescribe provisions in such larger leases to require relinquishment of acreage in the event of failure to construct facilities, or may require advance rental or minimum royalty payments on a part of the acreage as a condition for combining leases or issuance of a single lease in excess of 2,560 acres.

(2) The Commissioner, with the consent of the lessor, may alter, change, or modify the development and producing requirements of the several leases and provide that operations and production on one lease shall be deemed to satisfy the development and producing requirements as to each lease combined.

§211.10 *Term of leases.*

Mining leases may be made for a specified term not to exceed ten years from the date of approval by the Secretary of the Interior, or his authorized representative, and as much longer as the substances specified in the lease are produced in paying quantities.

§ 211.11 *Government reserves right to buy minerals produced.*

In time of war or other public emergency all of the executive departments of the United States Government shall have the option to purchase at the posted market price on the date of sale all or any part of the substance or substances produced under any lease.

RENTS AND ROYALTIES

§ 211.12 *Manner of payments.*

(a) Except where otherwise provided by the terms of leases where the tribes are organized under the act of June

18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), all rents and other payments due under leases which have been or may be approved by the Secretary of the Interior shall be paid to the superintendent or to such other person as may be designated by the Secretary of the Interior, for the benefit of the lessors. Except advance payments for the first year which shall be sent direct to the superintendent at the time of filing leases, payments of rental and royalty under leases shall be transmitted through the supervisor, shall be accompanied by a statement by the lessee, in triplicate, showing the specific items of rental or royalty that the remittance is intended to cover, and shall be made at such time or times as the lease provides.

(b) In the event of the discovery of minerals in paying quantities all advance payments shall be allowed as credit on stipulated royalties for the year for which such advance payments have been made. No refund will be made under oil, gas, or other mining leases, in the event that royalty from production is not sufficient to equal the advance payment, nor will any part of the moneys so paid be refunded to the lessee because of any subsequent surrender or cancellation of the lease, nor shall the lessee be relieved from the obligation to pay said advance rental annually when it becomes due, by reason of any subsequent surrender or cancellation of the lease.

* * *

§ 211.14 *Annual rentals and expenditures for development on leases other than oil and gas.*

(a) Unless otherwise authorized by the Secretary or his authorized representative (1) a lease for minerals other than oil and gas shall provide for a yearly development expenditure of not less than $10 per acre and (2) all such

leases shall provide for a rental payment of not less than $1 for each acre or fraction of an acre payable on or before the first day of each lease year.

(b) Within 20 days after the lease year, an itemized statement, in duplicate, of the expenditure for development under a lease for minerals other than oil and gas shall be filed with the Superintendent. The lessee must certify the statement under oath.

§ 211.14a *Suspension of operations and production on leases for minerals other than oil and gas.*

The Secretary of the Interior or his authorized representative, after obtaining the consent of the tribe, may authorize suspension of operating and producing requirements on mining leases for minerals other than oil and gas whenever during the primary term of the leases, it is considered that marketing facilities are inadequate or economic conditions unsatisfactory. Applications by lessees for relief from all operating and producing requirements on such mineral leases shall be filed in triplicate, in the office of the Regional Mining Supervisor of the Geological Survey and a copy thereof filed with the Superintendent. Complete information must be furnished showing the necessity for such relief. Suspension of operations and production shall not relieve the lessee from the obligations of continued payment of the annual rental or the minimum royalty.

[24 FR 9510, Nov. 26, 1959. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 211.15 *Royalty rates for minerals other than oil and gas.*

Unless otherwise authorized by the Commissioner of Indian Affairs, the minimum rates for minerals other than oil and gas shall be as follows:

(a) For substances other than gold, silver, copper, lead, zinc, tungsten, coal, asphaltum and allied substances, oil, and gas, the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 percent of the value, at the nearest shipping point, of all ores, metals, or minerals marketed.

(b) For gold and silver the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 percent to be computed on the value of bullion as shown by mint returns after deducting forwarding charges to the point of sale; and for copper, lead, zinc, and tungsten, a royalty of not less than 10 percent to be computed on the value of ores and concentrates as shown by reduction returns after deducting freight charges to the point of sale. Duplicate returns shall be filed by the lessee with the Superintendent within 10 days after the ending of the quarter or other period specified in the lease within which such returns are made: *Provided, however,* That the lessee shall pay a royalty of not less than 10 percent of the value of the ore or concentrates sold at the mine unless otherwise provided in the lease.

(c) For coal the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 cents per ton of 2,000 pounds of mine run, or coal as taken from the mine, including what is commonly called "slack".

(d) For asphaltum and allied substances the lessee shall pay quarterly or as otherwise provided in the lease, a

royalty of not less than 10 cents per ton of 2,000 pounds on crude material or not less than 60 cents per ton on refined substances.

* * *

§ 211.18 *Inspection of premises, books and accounts.*

Lessees shall agree to allow the lessors and their agents or any authorized representative of the Interior Department to enter, from time to time, upon and into all parts of the leased premises for the purpose of inspection, and shall further agree to keep a full and correct account of all operations and make reports thereof, as required by the regulations of the Department governing operations on public and restricted Indian lands; and their books and records, showing manner of operations and persons interested, shall be open at all times for examination of such officers of the Department as shall be instructed in writing by the Secretary of the Interior or authorized by regulations to make such examination.

* * *

§ 211.20 *Permission to start operations.*

(a) No operations will be permitted on any lease before it it approved by the Secretary of the Interior.

(b) Written permission must be secured from the supervisor before any operations are started on the leased premises. After such permission is secured the operations must be in accordance with the operating regulations promulgated by the Secretary of the Interior. Copies of the regulations in this part may be secured from either the supervisor or the superintendent and no operations shall be attempted without a study of the operating regulations.

* * *

§ 211.22 *Penalties.*

Failure of the lessee to comply with any provisions of the lease, of the operating regulations, of the regulations in this part, order of the superintendent or his representative, or of the orders of the supervisor or his representative, shall subject the lease to cancellation by the Secretary of the Interior or the lessee to a penalty of not more than $500 per day for each and every day the terms of the lease, the regulations, or such orders are violated; or to both such penalty and cancellation: *Provided,* That the lessee shall be entitled to notice and hearing, within 30 days after such notice, with respect to the terms of the lease, regulations, or orders violated, which hearing shall be held by the supervisor, whose findings shall be conclusive unless an appeal be taken to the Secretary of the Interior within 30 days after notice of the supervisor's decision, and the decision of the Secretary of the Interior upon appeal shall be conclusive.

§ 211.23 *Mines to be timbered properly.*

In mining operations the lessee shall keep the mine well and sufficiently timbered at all points where necessary, in accordance with good mining practice, and in such manner as may be necessary to the proper preservation of the leased property and safety of the workmen.

§ 211.24 *Surrender of leased premises in good condition.*

On expiration of the term of a lease, or when a lease is surrendered, the lessee shall deliver to the Government the leased ground with the mine workings in good order and condition, and bondsmen will be held for such deliv-

ery in good order and condition, unless relieved by the Secretary of the Interior for cause. It shall, however, be stipulated that the machinery necessary to operate the mine is the property of the lessee, but that it may be removed by him only after the condition of the property has been ascertained by inspection by the Secretary of the Interior or his authorized agents, to be in satisfactory condition.

§ 211.25 *Fees.*

Unless otherwise authorized by the Secretary of the Interior or his authorized representative, each lease, mining permit, sublease, or assignment shall be accompanied at the time of filing by a fee of $10. Such fee will not be required on sand and gravel permits issued to States, counties, or other municipal bodies.

(Sec. 1, 41 Stat. 415, as amended: 25 U.S.C. 413)

[24 FR 7949, Oct. 2, 1959. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 211.26 *Assignments and overriding royalties.*

(a) Approved leases or any interest therein may be assigned or transferred only with the approval of the Secretary of the Interior, and to procure such approval the assignee must be qualified to hold such lease under existing rules and regulations and shall furnish a satisfactory bond conditioned for the faithful performance of the covenants and conditions thereof: *Provided,* That in order for such assignment to receive favorable consideration the lessee shall assign either his whole interest or an undivided interest in the whole lease.

(b) No lease or interest therein or the use of such lease shall be assigned, sublet, or transferred, directly or indirectly by working or drilling contract, or otherwise, without the consent of the Secretary of the Interior.

(c) Assignments of leases, and stipulations modifying the terms of existing leases, which stipulations are also subject to the approval of the Secretary of the Interior, shall be filed with the superintendent within 30 days after the date of execution.

(d) Agreements creating overriding royalties or payments out of production on oil and gas leases shall not be considered as interests in the leases as such term is used in this section. Agreements creating overriding royalties or payments out of production are hereby authorized and the approval of the Department of the Interior or any agency thereof shall not be required with respect thereto, but such agreements shall be subject to the condition that nothing in any such agreement shall be construed as modifying any of the obligations of the lessee, including, but not limited to, obligations for diligent development and operation, protection against drainage, compliance with oil and gas operating regulations (30 CFR Part 221), and the requirement for departmental approval before abandonment of any well. All such obligations are to remain in full force and effect, the same as if free of any such royalties or payments. The existence of agreements creating overriding royalties or payments out of production, whether or not actually paid, shall not be considered as justification for the approval of abandonment of any well. Nothing in this paragraph revokes the requirement for approval of assignments and other instruments which is required in this section, but any over-

riding royalties or payments out of production created by the terms of such assignments or instruments shall be subject to the condition stated above. Agreements creating overriding royalties or payments out of production need not be filed with the Superintendent unless incorporated in assignments or instruments required to be filed pursuant to this section.

[22 FR 10588, Dec. 24, 1957, as amended at 23 FR 9738, Dec. 18, 1958. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 211.27 *Cancellation.*

(a) When, in the opinion of the Secretary of the Interior, the lessee has violated any of the terms and conditions of a lease or of the applicable regulations, the Secretary of the Interior shall have the right at any time after 30 days' notice to the lessee specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days after issuance of the notice, to declare such lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land.

(b) On the following conditions, the lessee may, on approval of the Secretary of the Interior, surrender a lease or any part of it:

(1) That he make application for cancellation to the superintendent having jurisdiction over the land.

(2) That he pay a surrender fee of $1 at the time the application is made.

(3) That he pay all royalties and rentals due to the date of such application.

(4) That he make a satisfactory showing that full provision has been made for conservation and protection of the property and that all wells, drilled on the portion of the lease surrendered, have been properly abandoned.

(5) If the lease has been recorded, that he file, with his application, a recorded release of the acreage covered by the application.

(6) If the application is for the cancellation of the entire lease or the entire undivided portion, that he surrender the lease: *Provided,* That where the application is made by an assignee to whom no copy of the lease was delivered, he will be required to surrender only his copy of the assignment.

(7) If the lease (or portion being surrendered or canceled) is owned in undivided interests by more than one party, then all parties shall join in the application for cancellation.

(8) That all required fees and papers must be in the mail or received on or before the date upon which rents and royalties become due, in order for the lessee and his surety to be relieved from liability for the payment of such royalties and rentals.

(9) If there has been a contest respecting a lease or leases, the approved, the disapproved, or the canceled parts thereof will be held in the office of the superintendent for 5 days after the Department's decision has been promulgated, by mail or delivery, and will not be delivered, if within that period a motion for review and reconsideration be filed, until such motion is passed upon by the Department.

(10) In the event oil or gass is being drained from the leased premises by wells not covered by a lease; [sic] the lease, or any part of it, may be surrendered, only on such terms and conditions as the Secretary of the Interior may determine to be reasonable and equitable.

(c) No part of any advance rental shall be refunded to the lessee nor shall he be relieved, by reason of any subsequent surrender or cancellation of the lease, from the obligation to pay said advance rental when it becomes due.

§ 211.27a *Prospecting permits.*

With the consent of the tribal authorities the superintendent may issue permits to prospect for minerals other than oil and gas upon tribal lands. Such permits must describe the area to be prospected and definitely state the period of time within which such work is permitted. No ores shall be removed from the reservation under such permits, except samples for assay and experimental purposes. A prospecting permit will not give the permittee any preference right to a lease, unless specifically so stated in the permit, and all permits granting a preference right to a lease must comply with all the laws and regulations applicable to mineral leases on tribal Indian lands.

§ 211.28 *Effective date of regulations.*

The regulations in this part shall become effective and in full force from and after the date of approval, and shall be subject to change or alteration at any time by the Secretary of the Interior: *Provided,* That no regulations

made after the approval of any lease shall operate to affect the term of the lease, rate of royalty, rental, or acreage unless agreed to by both parties to the lease. All former regulations governing the leasing of tribal lands for mining purposes are superseded by the regulations in this part.

§ 211.29 *Exemption of leases made by organized tribes.*

The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), the Alaska Act of May 1, 1936 (49 Stat. 1250; 48 U.S.C. 362, 258a), or the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C., and Sup., 501-509), or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.

§ 211.30 *Forms.*

Leases, assessments, and other instruments shall be on forms prescribed by the Secretary of the Interior or his authorized representative and may be obtained from the superintendent or other officer having jurisdiction over the lands.

[24 FR 7949, Oct. 2, 1959, Redesignated at 47 FR 13327, Mar. 30, 1982]

24. Article IX, Section 5 of the Montana Constitution

Severance tax on coal—trust fund. The legislature shall dedicate not less than one-fourth (¼) of the coal severance tax to a trust fund, the interest and income from which may be appropriated. The principal of the trust shall forever remain inviolate unless appropriated by vote of three-fourths (¾) of the members of each house of the legislature. After December 31, 1979, at least fifty percent (50%) of the severance tax shall be dedicated to the trust fund.

History: En. Const. Amend. No. 3, 1976.

25. Montana Coal Gross Proceeds Tax (Mont. Code Ann. §§ 15-23-701 to 704 (1985))

15-23-701. *Reporting gross yield from coal.* (1) Each person engaged in mining coal must, on or before March 31 each year, file with the department of revenue a statement of the gross yield from each coal mine owned or worked by such person in the preceding calendar year and the value thereof. The statement shall be in the form prescribed by the department, which may be coordinated with the form used under 15-35-104 and must be verified by an officer of the firm. The statement shall include:

(a) the name and address of the owner or lessee or operator of the mine;

(b) the location of the mine;

(c) the tons of coal extracted, treated, and sold from the mine during the taxable period;

(d) the gross yield or value in dollars and cents derived from the contract sales price as defined in 15-35-102(1).

(2) Whenever value is imputed under 15-35-107(1)(b), that value shall be used for purposes of reporting the value of the gross yield of coal under this section.

History: En. 84-1320 by Sec. 9, Ch. 525, L. 1975; amd. Sec. 3, Ch. 156, L. 177; R.C.M. 1947, 84-1320; (2)En. Sec. 2, Ch. 326, L. 1983.

15-23-702. *Transmission of gross proceeds to county assessor.* On or before July 1 each year, the department shall transmit to the county assessor of each county in

which coal mines are situated the valuation of the gross proceeds of such mines for the purpose of taxation, as the same have been determined by the department. The county assessor shall immediately enter the same upon a suitable assessment roll, the form of which shall be prescribed by the department.

History: En. 84-1321 by Sec. 10, Ch. 525, L. 1975; R.C.M. 1947, 84-1321.

15-23-703. *Taxation of gross proceeds.* The county assessor shall prepare from the reported gross proceeds from coal a tax roll which he shall transmit to the county treasurer on or before September 15 each year. The county treasurer shall proceed to give full notice thereof to each coal producer and to collect the taxes due within 60 days after mailing.

History: En. 84-1322 by Sec. 11, Ch. 525, L. 1975; R.C.M. 1947, 84-1322.

15-23-704. *Lien of tax—enforcement of payment.* The tax on gross proceeds from coal shall be levied as taxes on other forms of property, and this tax and the severance tax on coal production are each a lien upon the coal mine and a prior lien upon all personal property and improvements used to produce the coal. These taxes may be collected by the seizure and sale of the personal property on which the tax is a lien as provided under 15-16-113 and chapter 17, part 9, or by suit under 15-16-501 and 15-16-502.

History: En. 84-1323 by Sec. 12, Ch. 525, L. 1975; R.C.M. 1947, 84-1323.

26. Montana Coal Severance Tax (Mont. Code Ann. §§ 15-35-101 to 205 (1985))

15-35-101. *Legislative findings and declarations of purpose.* (1) The legislature finds that while coal is extracted from the earth like metal minerals, there are differences between coal and metal minerals such that they should be classified in different categories for taxation purposes. The legislature finds that while coal can be utilized like petroleum products, there are differences between coal and petroleum such that they should be classified in different categories for taxation purposes. The legislature further finds that:

(a) coal is the only mineral which can supply energy while being easily found in abundance in Montana;

(b) coal is the only mineral which is so often marketed through sales contracts of many years' duration;

(c) coal, unlike most minerals, varies widely in composition and consequent value when marketed;

(d) coal in Montana is subject to regional and national demands for development which could affect the economy and environment of a larger portion of the state than any other mineral development has done;

(e) coal in Montana, when subbituminous and recoverable by strip mining, is in sufficient demand that at least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes;

(f) coal in the lignite form is in less demand and producers of lignite are able to pay lesser amounts of royalty and production tax than producers of subbituminous can pay;

(g) coal produced in underground mines has higher production costs and underground producers are able to pay lesser amounts of royalty and production tax than strip-mine producers can pay;

(h) coal production in Montana has been subject to an uncoordinated array of taxes which overlap one another and yield revenue in an inconsistent and unpredictable manner.

(2) The legislature declares that the purposes of this chapter are to:

(a) allow the severance taxes on coal production to remain a constant percentage of the price of coal;

(b) stabilize the flow of tax revenue from coal mines to local governments through the property taxation system;

(c) simplify the structure of coal taxation in Montana, reducing tax overlap and improving the predictability of tax projections; and

(d) accomplish the foregoing purposes by establishing categories of taxation which recognize the unique character of coal as well as the variations found within the coal industry.

History: En. 84-1312 by Sec. 1, Ch. 525, L. 1975; R.C.M. 1947, 84-1312.

15-35-102. *Definitions.* As used in this chapter, the following definitions apply:

(1) "Agreement" means a signed contract that is valid under Montana law between a coal mine operator and a purchaser or broker for the sale of coal that is produced in Montana.

(2) "Base consumption level" for a purchaser means the greater of:

(a) the arithmetic average volume of coal purchased during calendar years 1983 and 1984 from all Montana coal mine operators; or

(b) 90% of the maximum tonnage provided for in any agreement executed prior to January 1, 1985, for which the highest scheduled minimum quantity of coal stipulated by the terms of the agreement as they existed on January 1, 1985, has not been purchased at any time during the term of the agreement, plus the arithmetic average volume of coal purchased during calendar years 1983 and 1984 from all Montana coal mine operators under all other agreements.

(3) "Base production level" for a coal mine operator means the arithmetic average volume of coal produced in Montana and sold to a purchaser in calendar years 1983 and 1984.

(4) "Broker" means any person who resells Montana coal.

(5) "Contract sales price" means either the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes paid on production, or a price imputed by the department under 15-35-107. Contract sales price includes all royalties paid on production, no matter how such royalties are calculated. However, with respect to royalties paid to the government of the United States, the state of Montana, or a federally recognized Indian tribe, the contract sales price includes only:

(a) for quarterly periods ending on and after September 30, 1984, 15 cents per ton plus 75% of the difference between 15 cents per ton and the amount of such federal, state, and tribal government royalties actually paid;

(b) for quarterly periods ending on and after September 30, 1985, 15 cents per ton plus 50% of the difference between 15 cents per ton and the amount of such federal, state, and tribal government royalties actually paid;

(c) for quarterly periods ending on and after September 30, 1986, 15 cents per ton plus 25% of the difference between 15 cents per ton and the amount of such federal, state, and tribal government royalties actually paid; and

(d) for quarterly periods ending on and after September 30, 1987, 15 cents per ton.

(6) "Department" means the department of revenue.

(7) "Energy conversion process" includes any process by which coal in the solid state is transformed into slurry, gas, electric energy, or any other form of energy.

(8) "Incremental production" means that quantity of coal produced annually by a coal mine operator and sold to a qualified purchaser that exceeds the base production level of the coal mine operator for that purchaser but only to the extent the quantity of coal exceeds that purchaser's base consumption level from all Montana producers.

(9) "Produced" means severed from the earth.

(10) "Purchaser" means a person who purchases or contracts to purchase Montana coal directly from a coal mine operator or indirectly from a broker and who utilizes that coal in any industrial, commercial, or energy conver-

sion process. A coal broker or any other third party intermediary is not a purchaser under the provisions of this chapter.

(11) "Qualified purchaser" means a purchaser whose purchases of Montana coal in any given year exceed his base consumption level. A purchaser of Montana coal who enters into a coal agreement with another purchaser or a broker that causes a reduction in the base consumption level of a purchaser is not a qualified purchaser.

(12) "Strip mining" or "surface mining" is defined in 82-4-203.

(13) "Taxes paid on production" includes any tax paid to the federal, state, or local governments upon the quantity of coal produced as a function of either the volume or the value of production and does not include any tax upon the value of mining equipment, machinery, or buildings and lands, any tax upon a person's net income derived in whole or in part from the sale of coal, or any license fee.

(14) "Ton" means 2,000 pounds.

(15) "Underground mining" means a coal mining method utilizing shafts and tunnels and as further defined in 82-4-203.

History: En. 84-1313 by Sec. 2, Ch. 525, L. 1975; amd. Sec. 1, Ch. 156, L. 1977; R.C.M. 1947, 84-1313; amd. Sec. 1, Ch. 377, L. 1983; amd. Sec. 2, Ch. 636, L. 1985.

15-35-103. *Severance tax — rates imposed — exemptions.* (1) A severance tax is imposed on each ton of coal produced in the state in accordance with the following schedule:

Heating quality (Btu per pound of coal):	Surface Mining	Underground Mining
Under 7,000	12 cents or 20% of value	5 cents or 3% of value
7,000-8,000	22 cents or 30% of value	8 cents or 4% of value
8,000-9,000	34 cents or 30% of value	10 cents or 4% of value
Over 9,000	40 cents or 30% of value	12 cents or 4% of value

"Value" means the contract sales price.

(2) The formula which yields the greater amount of tax in a particular case shall be used at each point on this schedule.

(3) A person is not liable for any severance tax upon 50,000 tons of the coal he produces in a calendar year, except that if he produces more than 50,000 tons of coal in a calendar year, he will be liable for severance tax upon all coal produced in excess of the first 20,000 tons.

(4) A new coal production incentive tax credit may be claimed on certain coal as provided in 15-35-202.

History: En. 84-1314 by Sec. 3, Ch. 525, L. 1975; amd. Sec. 1, Ch. 164, L. 1977; R.C.M. 1947, 84-1314; amd. Sec. 2, Ch. 303, L. 1983; amd. Sec. 7, Ch. 636, L. 1985.

15-35-104. *Quarterly statement and payment of tax.* Each coal mine operator shall compute the severance tax due on each quarter-year's worth of production on forms prescribed by the department. The statement shall indi-

cate the tonnage produced, the average Btu value of the production, the contract sales price received for the production, and such other information as the department may require. The completed form in duplicate, with the tax payment, shall be delivered to the department not later than 30 days following the close of the quarter. The form shall be signed by the operator if the operator is an individual or by an officer of the coal mine operator if the operator is a business entity. A person operating more than one coal mine in this state may include all of his mines in one statement. The department may grant a reasonable extension of time for filing statements and payment of taxes due upon good cause shown therefor.

History: En. 84-1315 by Sec. 4, Ch. 525, L. 1975; R.C.M. 1947, 84-1315; amd. Sec. 1, Ch. 334, L. 1981.

15-35-105. *Penalty for delinquent tax.* The department shall add to the amount of all delinquent severance taxes a penalty of 10% of the delinquent amount plus interest at the rate of 1% per month or fraction thereof computed on the total amount of severance tax and penalty. Interest shall be computed from the date the severance tax was due to the date of payment. The department shall mail to the person required to file a quarterly report and pay any severance tax, a letter setting forth the amount of tax, penalty, and interest due, and the letter shall further contain a statement that if payment is not made, a warrant for distraint may be filed. The penalty amount may be waived by the department if reasonable cause for the failure or neglect to file the quarterly statement is provided to the department.

History: En. 84-1316 by Sec. 5, Ch. 525, L. 1975; R.C.M. 1947, 84-1316; amd. Sec. 16, Ch. 439, L. 1981.

15-35-106. *Annual testing of samples.* The Montana state bureau of mines and geology shall test coal production subject to this chapter and may make rules governing the collection of test data. A person subject to this chapter shall submit to the bureau on or before August 1 each year a sample of mine-run, "as is" coal from each mine producing that year. Additional samples shall be submitted at the request of the bureau. The bureau shall compute the Btu per pound of each sample received and forward this information to the department prior to September 1 each year.

History: En. 84-1317 by Sec. 6, Ch. 525, L. 1975; R.C.M. 1947, 84-1317.

15-35-107. *When value of coal may be imputed—procedure.* (1) The department may or shall at the request of the taxpayer impute a value to the coal which approximates market value f.o.b. mine in a case where:

(a) the operator of a coal mine is using the produced coal in an energy-conversion or other manufacturing process;

(b) the operator of a coal mine refines the coal by drying, cleaning, or other processing designed to improve the quality of the coal;

(c) a person sells coal under a contract which is not an arm's-length agreement; or

(d) a person neglects or refuses to file a statement under 15-23-701 or a statement and tax return under this chapter.

(2) For purposes of subsection (1)(b), "market value f.o.b. mine" means the value of the coal subsequent

to primary and secondary crushing but prior to drying, cleaning, or other processing.

(3) When imputing value, the department may apply the factors used by the federal government under 26 U.S.C., section 613, or that provision as it may be labeled or amended, in determining gross income from mining or the department may apply any other or additional criteria it considers appropriate. Each subject taxpayer shall upon request by the department furnish a copy of its federal income tax return, with any amendments, filed for the year in which the value of coal is being imputed and copies of the contracts under which it is selling coal at the time. When the department's estimate of market value is contested in any proceeding, the burden of proof is on the contesting party.

History: En. 84-1318 by Sec. 7, Ch. 525, L. 1975; R.C.M. 1947, 84-1318, amd. Sec. 1, Ch. 326, L. 1983.

15-35-108. *Disposal of severance taxes.* Severance taxes collected under the provisions of this chapter are allocated as follows:

(1) To the trust fund created by Article IX, section 5, of the Montana constitution, 50% of total coal severance tax collections. The trust fund moneys shall be deposited in the fund established under 17-6-203(5) and invested by the board of investments as provided by law.

(2) Starting July 1, 1986, and ending June 30, 1987, 6% of coal severance tax collections are allocated to the highway reconstruction trust fund account in the state special revenue fund. Starting July 1, 1987, and ending June 30, 1993, 12% of coal severance tax collections are

allocated to the highway reconstruction trust fund account in the state special revenue fund.

(3) Coal severance tax collections remaining after the allocations provided by subsections (1) and (2) are allocated in the following percentages of the remaining balance:

(a) 2½% until July 1, 1987, and thereafter 4½% to the state special revenue fund to the credit of the alternative energy research development and demonstration account;

(b) 26% until July 1, 1987, and thereafter 37½% to the state special revenue fund to the credit of the local impact and education trust fund account;

(c) 10% to the state special revenue fund for state equalization aid to public schools of the state;

(d) 1% to the state special revenue fund to the credit of the county land planning account;

(e) 1¼% to the credit of the renewable resource development bond fund;

(f) 5% to a nonexpendable trust fund for the purpose of parks acquisition or management, protection of works of art in the state capitol, and other cultural and aesthetic projects. Income from this trust fund shall be appropriated as follows:

(i) ⅓ for protection of works of art in the state capitol and other cultural and aesthetic projects; and

(ii) starting July 1, 1985, and ending June 30, 1989, ⅔ for the acquisition, development, operation, and maintenance of any sites and areas described in 23-1-102 and,

after June 30, 1989, ⅔ for the acquisition of sites and areas described in 23-1-102 and the development, operation, and maintenance of sites acquired with funds allocated under this subsection;

(g) 1% to the state special revenue fund to the credit of the state library commission for the purposes of providing basic library services for the residents of all counties through library federations and for payment of the costs of participating in regional and national networking;

(h) ½ of 1% to the state special revenue fund for conservation districts;

(i) 1¼% to the debt service fund type to the credit of the water development debt service fund;

(j) 4% until July 1, 1987, to the highway reconstruction trust fund account in the state special revenue fund;

(k) all other revenues from severance taxes collected under the provisions of this chapter to the credit of the general fund of the state.

History: En. 84-1309.1 by Sec. 2, Ch. 432, L. 1973; amd. Sec. 1, Ch. 250, L. 1974; amd. Sec. 4, Ch. 501, L. 1975; amd. Sec. 3, Ch. 502, L. 1975; amd. and redes. 84-1319 by Sec. 8, Ch. 525, L. 1975; amd. Sec. 2, Ch. 156, L. 1977; amd. Sec. 1, Ch. 540, L. 1977; amd. Sec. 2, Ch. 549, L. 1977; R.C.M. 1947, 84-1319; amd. Sec. 1, Ch. 653, L. 1979; amd. Sec. 1, Ch. 694, L. 1979; amd. Sec. 1, Ch. 479, L. 1981; amd. Sec. 43, Ch. 505, L. 1981; amd. Sec. 3, Ch. 281, L. 1983; amd. Sec. 5, Ch. 541, L. 1983; amd. Sec. 1, Ch. 246, L. 1985; amd. Sec. 1, Ch. 715, L. 1985.

15-35-112. *Deficiency assessment—hearing—interest* (1) When the department of revenue determines that the amount of tax due is greater than the amount disclosed by a return, it shall mail to the taxpayer a notice of the additional tax proposed to be assessed. Within 30 days after mailing of the notice, the taxpayer may file with the department a written protest against the proposed additional tax, setting forth the grounds upon which the protest is based, and may request in his protest an oral hearing or an opportunity to present additonal evidence relating to his tax liability. If no protest is filed, the amount of the additional tax proposed to be assessed becomes final upon the expiration of the 30-day period. If a protest is filed, the department must reconsider the proposed assessment and, if the taxpayer has so requested, must grant the taxpayer an oral hearing. After consideration of the protest and the evidence presented at any oral hearing, the department's action upon the protest is final when it mails notice of its action to the taxpayer.

(2) When a deficiency is determined and the tax becomes final, the department shall mail a notice and demand for payment to the taxpayer. The tax is due and payable at the expiration of 10 days from the date of such notice and demand. Interest on any deficiency assessment shall bear interest until paid at the rate of 1% a month or fraction thereof, computed from the original due date of the return.

History: En. Sec. 1, Ch. 14, L. 1983.

15-35-113. *Credit for overpayment—interest on overpayment.* (1) If the department of revenue determines that the amount of tax, penalty, or interest due for any year is less than the amount paid, the amount of the over-

payment shall be credited against any tax, penalty, or interest then due from the taxpayer and the balance refunded to the taxpayer or its successor through reorganization, merger, or consolidation or to its shareholders upon dissolution.

(2) Except as provided in subsection (3), interest shall be allowed on overpayments at the same rate as is charged on deficiency assessments provided in 15-35-112 due from the due date of the return or from the date of overpayment (whichever date is later) to the date the department approves refunding or crediting of the overpayment.

(3) (a) Interest shall not accrue during any period the processing of a claim for refund is delayed more than 30 days by reason of failure of the taxpayer to furnish information requested by the department for the purpose of verifying the amount of the overpayment.

(b) No interest shall be allowed:

(i) If the overpayment is refunded within 6 months from the date the return is due or from the date the return is filed, whichever is later; or

(ii) if the amount of interest is less than $1.

(c) A payment not made incident to a bona fide and orderly discharge of an actual tax liability or one reasonably assumed to be imposed by this law shall not be considered an overpayment with respect to which interest is allowable.

History: En. Sec. 2, Ch. 14, L. 1983.

15-35-114. *Statute of limitations.* (1) Except as otherwise provided in this section no deficiency may be as-

sessed or collected with respect to the year for which a return is filed unless the notice of additional tax proposed to be assessed is mailed within 5 years from the date the return was filed. For the purposes of this section, a return filed before the last day prescribed for filing is considered as filed on the last day. If the taxpayer, before the expiration of the period prescribed for assessment of the tax, consents in writing to an assessment after that time, the tax may be assessed at any time prior to the expiration of the period agreed upon.

(2) No refund or credit may be allowed or paid with respect to the year for which a return is filed after 5 years from the last day prescribed for filing the return or after 1 year from the date of the overpayment, whichever period expires later, unless before the expiration of the period the taxpayer files a claim therefor or the department of revenue has determined the existence of the overpayment and has approved the refund or credit thereof. If the taxpayer has agreed in writing under the provisions of subsection (1) to extend the time within which the department may propose an additional assessment, the period within which a claim for refund or credit may be filed or a credit or refund allowed if no claim is filed is automatically extended.

(3) If a return is required to be filed and the taxpayer fails to file the return, the tax may be assessed or an action to collect the tax may be brought at any time. If a return is required to be filed and the taxpayer files a fraudulent return, the 5-year period provided for in subsection (1) does not begin until discovery of the fraud by the department.

History: En. Sec. 1, Ch. 194, L. 1983.

15-35-121. *Penalties for neglect or false statement.* A person who fails, neglects, or refuses to file any statement required under this chapter or who makes a false statement commits a misdemeanor. A person convicted under this section shall be fined not to exceed $1,000 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

History: En. 84-1324 by Sec. 13, Ch. 525, L. 1975; R.C.M. 1947, 84-1324; MCA 1981, 15-35-110; redes. 15-35-121 by Code Commissioner, 1983.

15-35-122. *Rulemaking authority.* The department of revenue may adopt rules necessary for the taxation of property under this chapter.

History: En. Sec. 32, Ch. 581, L. 1979; MCA 1981, 15-35-111; redes. 15-35-122 by Code Commissioner, 1983.

15-35-201. *Short title.* This part may be cited as the "New Coal Production Incentive Tax Credit Act of 1985".

History: En. Sec. 1, Ch. 636, L. 1985.

15-35-202. *New coal production incentive tax credit allowed—application limited.* (1) A coal mine operator is entitled to a new coal production incentive tax credit of 33⅓% of the tax imposed under 15-35-103 on any incremental production produced and sold during calendar years 1985 and 1986.

(2) A coal mine operator is entitled to a new coal production incentive tax credit of 33⅓% of the tax imposed under 15-35-103 on incremental production for the entire term of an agreement, except as provided in subsection (3),

if the incremental production resulted from coal purchases under:

(a) an existing agreement which was extended between January 1, 1985, and June 30, 1987, for at least a 5-year period; or

(b) a new agreement that was executed between January 1, 1985, and June 30, 1987.

(3) No credit may be claimed for coal produced prior to January 1, 1985.

History: En. Sec. 3, Ch. 636, L. 1985.

15-35-203. *Calculation and application of credit.* (1) The amount of new coal production incentive tax credit that a coal mine operator may claim against the tax imposed in 15-35-103 is calculated by:

(a) Determining the incremental production for each of his qualified purchasers that was produced during a calendar year;

(b) determining the arithmetic average severance tax per ton calculated prior to application of the credit on coal sold to each qualified purchaser during the calendar year;

(c) multiplying the incremental production for a calendar year for a purchaser by the average severance tax per ton for that purchaser and multiplying the total by 33⅓%; and

(d) totaling the amount so calculated for all qualified purchasers.

(2) When filing the quarterly statement required in 15-35-104, a coal mine operator may claim against the coal

severance tax calculated for that quarter an amount equal to 25% of the new coal production incentive tax credit allowed on incremental production that occurred during the previous calendar year.

(3) If in any calendar year a purchaser exceeds his base consumption level and he has purchased from more than one Montana coal mine operator during the year, the credit on the incremental production must be divided among the operators on a pro rata basis. To determine each coal mine operator's pro rata share of the tax credit, each operator shall divide his incremental production by the sum of all coal mine operators' incremental production for that purchaser and multiply the quotient by the purchases in excess of the base consumption level for that purchaser.

(4) Neither a coal mine operator nor a purchaser is entitled to a direct payment for the credit allowed in 15-35-202. A credit terminates if not taken during the year following the year in which the incremental production occurred.

(5) Each coal mine operator must reduce the delivered price of coal sold to each qualified purchaser by an amount equal to the credit received on incremental production sold to that purchaser.

History: En. Sec. 4, Ch. 636, L. 1985.

15-35-204. *Reporting requirements for credit—duty of department.* (1) Every Montana coal mine operator must provide to the department:

(a) on or before April 30, 1985, a list showing the amount of coal produced and sold in calendar years 1983

and 1984 to every purchaser, including purchasers who obtained coal from the coal mine operator through a broker; and

(b) with the quarterly statement required by 15-35-104, a list of the number of tons produced and sold to every purchaser during the quarter and the severance tax calculated prior to the application of the credit on these tons.

(2) To be eligible for the tax credit provided for in 15-35-202, a coal mine operator must furnish to the department:

(a) on or before April 30, 1985, copies of all existing coal sales agreements;

(b) with the quarterly statement required by 15-35-104, a copy of any new coal sales agreements or extensions of existing agreements executed during the quarter;

(c) on or before January 31 of each year:

(i) a list of incremental production for all qualified purchasers during the previous calendar year;

(ii) a written statement from each qualified purchaser verifying the volume of coal purchased in that year from all Montana coal mine operators; and

(iii) the necessary information on incremental production purchased through a broker to verify that such incremental production did not cause a reduction in the base consumption level of any other purchaser of Montana coal; and

(d) any other data, reports, evidence, or production data that may be necessary for the department to deter-

mine whether a purchaser is a qualified purchaser and the base consumption level for each purchaser.

(3) By July 1, 1985, the department shall prepare and publish for informational purposes only an unaudited compilation of the base production level for each coal mine operator and a compilation of the base consumption level for each purchaser.

(4) Any coal mine operator or purchaser may, for the purpose of determining the eligibility of coal production for the new production incentive tax credit, file with the department a petition for a declaratory ruling as provided in 2-4-501. The department shall issue a ruling on the petition within 90 days of the date the petition was filed with the department.

History: En. Sec. 5, Ch. 636, L. 1985.

15-35-205. *Returns and taxpayer information open to public inspection—certain exceptions.* (1) All information filed with the department in accordance with 15-35-204 is public record and open to public inspection, except the information required under 15-35-204(1)(b) and the coal sales agreements specified in 15-35-204(2)(a) and (2)(b).

(2) Except during proceedings before the state tax appeal board pursuant to 15-2-201, the information required under 15-35-204(1)(b) and the coal sales agreements specified in 15-35-204(2)(a) and (2)(b) are open to inspection only upon the order of the governor, under rules to be prescribed by the department, or upon order of a court of competent jurisdiction.

History: En. Sec. 6, Ch. 636, L. 1985.

27. 1987 Montana Laws, ch. 608

AN ACT LOWERING COAL SEVERANCE TAX RATES; A CONTINGENT PERMANENT REDUCTION; EXTENDING THE NEW PRODUCTION CREDIT; REVISING LEGISLATIVE FINDINGS AND DECLARATIONS OF PURPOSE; AMENDING SECTIONS 15-35-101 THROUGH 15-35-104, 15-35-202, AND 15-35-203, MCA; AND PROVIDING AN EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 15-35-101, MCA, is amended to read: -

"15-35-101. Legislative findings and declarations of purpose. (1) The legislature finds that while coal is extracted from the earth like metal minerals, there are differences between coal and metal minerals such that they should be classified in different categories for taxation purposes. The legislature finds that while coal can be utilized like petroleum products, there are differences between coal and petroleum such that they should be classified in different categories for taxation purposes. The legislature further finds that:

(a) coal is the only mineral which can supply energy while beinig easily found in abundance in Montana;

(b) coal is the only mineral which is so often marketed through sales contracts of many years' duration;

(c) coal, unlike most minerals, varies widely in composition and consequent value when marketed;

(d) coal in Montana is subject to regional and national demands for development which could affect the

economy and environment of a larger portion of the state than any other mineral development has done;

(e) *subbituminous coal and lignite* coal in Montana *have sufficiently different markets and value and therefore require different production taxes*;

(*f*) coal produced in underground mines has higher production costs and underground producers are able to pay lesser amounts of royalty and production tax than strip-mine producers can pay; *and*

(*g*) coal production in Montana has been subject to an uncoordinated array of taxes which overlap one another and yield revenue in an inconsistent and unpredictable manner.

(2) The legislature declares that the purposes of this chapter are to:

(a) allow the severance taxes on coal production to remain a constant percentage of the price of coal;

(b) stabilize the flow of tax revenue from coal mines to local governments through the property taxation system;

(c) simplify the structure of coal taxation in Montana, reducing tax overlap and improving the predictability of tax projections; and

(d) accomplish the foregoing purposes by establishing categories of taxation which recognize the unique character of coal as well as the variations found within the coal industry."

Section 2. Section 15-35-102, MCA, is amended to read:

"15-35-102. Definitions. As used in this chapter, the following definitions apply:

(1) "Agreement" means a signed contract that is valid under Montana law between a coal mine operator and a purchaser or broker for the sale of coal that is produced in Montana.

(2) (*a*) "Base consumption level" for a purchaser, *except as provided in subsection (2)(b),* means the *lesser* of:

(*i*) the volume of coal purchased during calendar *year 1986* from all Montana coal mine operators; or

(*ii*) *the greater of:*

(*A*) *the arithmetic average volume of coal purchased during calendar years 1983 and 1984 from all Montana coal mine operators; or*

(*B*) 90% of the maximum tonnage provided for in any agreement executed prior to January 1, 1985, for which the highest scheduled minimum quantity of coal stipulated by the terms of the agreement as they existed on January 1, 1985, has not been purchased at any time during the term of the agreement, plus the arithmetic average volume of coal purchased during calendar years 1983 and 1984 from all Montana coal mine operators under all other agreements.

(*b*) *If the volume calculated in subsection (2)(a)(i) is less than one-third of the volume calculated in subsection (2)(a)(ii), the base consumption level is the volume calculated in subsection (2)(a)(ii).*

(3) *(a) Except as provided in subsection (3)(b),* "*base* production level" for a coal mine operator means the *lesser of:*

(*i*) *the* arithmetic average volume of coal produced in Montana and sold to a purchaser in calendar years 1983 1984*; or*

(*ii*) *the volume of coal produced in Montana and sold to a purchaser in 1986.*

(*b*) *If the amount calculated in subsection (3)(a)(ii) is less than one-third of the amount calculated in subsecsection (3)(a)(i), the base production level is the amount calculated in subsection (3)(a)(i).*

(4) "Broker" means any person who resells Montana coal.

(5) "Contract sales price" means either the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes on production, or a price imputed by the department under 15-35-107. Contract sales price includes all royalties paid on production, no matter how such royalties are calculated. However, with respect to royalties paid to the government of the United States, the state of Montana, or a federally recognized Indian tribe, the contract sales price includes only:

(a) for quarterly periods ending on and after September 30, 1984, 15 cents per ton plus 75% of the difference between 15 cents per ton and the amount of such federal, state, and tribal government royalties actually paid;

(b) for quarterly periods ending on or after September 30, 1985, 15 cents per ton plus 50% of the difference between 15 cents per ton and the amount of such federal, state, and tribal government royalties actually paid;

(c) for quarterly periods ending on and after September 30, 1986, 15 cents per ton plus 25% of the difference between 15 cents per ton and the amount of such federal, state, and tribal government royalties actually paid; and

(d) for quarterly periods ending on and after September 30, 1987, 15 cents per ton.

(6) "Department" means the department of revenue.

(7) "Energy conversion process" includes any process by which coal in the solid state is transformed into slurry, gas, electric energy, or any other form of energy.

(8) "Incremental production" means that quantity of coal produced annually by a coal mine operator and sold to a qualified purchaser that exceeds the base production level of the coal mine operator for that purchaser, but only to the extent the quantity of coal exceeds that purchaser's base consumption level from all Montana producers.

(9) 'Produced" means severed from the earth.

(10) "Purchaser" means a person who purchases or contracts to purchase Montana coal directly from a coal mine operator or indirectly from a broker and who utilizes that coal in any industrial, commercial, or energy conversion process. A coal broker or any other third party intermediary is not a purchaser under the provisions of this chapter.

(11) "Qualified purchaser" means a purchaser whose purchases of Montana coal in any given year exceed

his base consumption level. A purchaser of Montana coal who enters into a coal agreement with another purchaser or a broker that causes a reduction in the base consumption level of a purchaser is not a qualified purchaser.

(12) "Strip mining" or "surface mining" is defined in 82-4-203.

(13) "Taxes paid on production" includes any tax paid to the federal, state, or local governments upon the quantity of coal produced as a function of either the volume or the value of production and does not include any tax upon the value of mining equipment, machinery, or buildings and lands, any tax upon a person's net income derived in whole or in part from the sale of coal, or any license fee.

(14) "Ton" means 2,000 pounds.

(15) "Underground mining" means a coal mining method utlizing shafts and tunnels and as further defined in 82-4-203."

Section 3. Section 15-35-103, MCA, is amended to read:

"15-35-103. Severance tax—rates imposed—exemptions. (1) *Except as provided in subsection (2)*, a severance tax is imposed on each ton of coal produced in the state in accordance with the following schedule:

(*a*) *Fiscal years 1988 and 1989:*

Heating quality (Btu per pound of coal):	Surface Mining	Underground Mining
Under 7,000	12 cents or 20% of value	5 cents or 3% of value

7,000-8,000	22 cents or 30% of value	8 cents or 4% of value
8,000-9,000	34 cents or 30% of value	10 cents or 4% of value
Over 9,000	40 cents or 30% of value	12 cents or 4% of value

(b) Fiscal Year 1990:

Heating quality (Btu per pound of coal):	*Surface Mining*	*Underground Mining*
Under 7,000	*12 cents or 13% of value*	*5 cents or 3% of value*
7,000-8,000	*22 cents or 25% of value*	*8 cents or 4% of value*
8,000-9,000	*34 cents or 25% of value*	*10 cents or 4% of value*
Over 9,000	*40 cents or 25% of value*	*12 cents or 4% of value*

(c) Fiscal Year 1991 and Thereafter:

Heating quality (Btu per pound of coal):	*Surface Mining*	*Underground Mining*
Under 7,000	*12 cents or 13% of value*	*5 cents or 3% of value*
7,000-8,000	*22 cents or 20% of value*	*8 cents or 4% of value*
8,000-9,000	*34 cents or 20% of value*	*10 cents or 4% of value*
Over 9,000	*40 cents or 20% of value*	*12 cents or 4% of value*

(2) (a) (i) On or before October 1, 1988, the department shall determine the total number of tons of coal produced in Montana and sold from July 1, 1987, through June 30, 1988. If the department finds that these sales exceed 32.2 million tons (which is the average total yearly coal sales for calendar years 1983, 1984, 1985, and 1986), the rate of the coal severance tax is as set forth in subsections (2) (b) through (2) (d).

(ii) If any facility that burned Montana coal at any time from July 1, 1987, to June 30, 1988, does not operate during a portion of that period due to mechanical failure or catastrophic act of God, the department shall determine the average monthly sales of Montana coal to the facility during its operation and multiply this figure by 12. The department shall include the product of this calculation in making its determination of coal produced in Montana and sold from July 1, 1987, through June 30, 1988.

(b) The severance tax imposed pursuant to subsection (2) (a) on each ton of coal produced in the state from July 1, 1988, through June 30, 1990, is:

Heating quality (Btu per pound of coal):	*Surface Mining*	*Underground Mining*
Under 7,000	*12 cents or 17% of value*	*5 cents or 3% of value*
7,000-8,000	*22 cents or 25% of value*	*8 cents or 4% of value*
8,000-9,000	*34 cents or 25% of value*	*10 cents or 4% of value*
Over 9,000	*40 cents or 25% of value*	*12 cents or 4% of value*

(c) The severance tax imposed pursuant to subsection (2)(a) on each ton of coal produced in the state from July 1, 1990, through June 30, 1991, is:

Heating quality (Btu per pound of coal):	*Surface Mining*	*Underground Mining*
Under 7,000	*12 cents or 13% of value*	*5 cents or 3% of value*
7,000-8,000	*22 cents or 20% of value*	*8 cents or 4% of value*
8,000-9,000	*34 cents or 20% of value*	*10 cents or 4% of value*
Over 9,000	*40 cents or 20% of value*	*12 cents or 4% of value*

(d) The severance tax imposed pursuant to subsection (2) (a) on each ton of coal produced in the state after June 30, 1991, is:

Heating quality (Btu per pound of coal):	*Surface Mining*	*Underground Mining*
Under 7,000	*12 cents or 13% of value*	*5 cents or 3% of value*
7,000-8,000	*22 cents or 15% of value*	*8 cents or 4% of value*
8,000-9,000	*34 cents or 15% of value*	*10 cents or 4% of value*
Over 9,000	*40 cents or 15% of value*	*12 cents or 4% of value*

(3) "Value" means the contract sales price.

(4) The formula which yields the greater amount of tax in a particular case shall be used at each point on *these schedules.*

(5) A person is not liable for any severance tax upon 50,000 tons of the coal he produces in a calendar year, except that if he produces more than 50,000 tons of coal in a calendar year, he will be liable for severance tax upon all coal produced in excess of the first 20,000 tons.

(6) A new coal production incentive tax credit may be claimed on certain coal as provided in 15-35-202."

Section 4. Section 15-35-104, MCA, is amended to read:

"15-35-104. Quarterly statement and payment of tax. Each coal mine operator shall compute the severance tax due on each quarter-year's worth of production on forum prescribed by the department. The statement shall indicate the tonnage produced, the average Btu value of the production, the contract sales price received for the production, and such other information as the department may require. *Each coal mine operator shall provide a statement of the tons of coal sold to each purchaser for the quarter.* The completed form in duplicate, with the tax payment shall be delivered to the department not later than 30 days following the close of the quarter. The form shall be signed by the operator if the operator is an individual or by an officer of the coal mine operator if the operator is a business entity. A person operating more than one coal mine in this state may include all of his mines in one statement. The department may grant a reasonable extension of time for filing statements and payment of taxes due upon good cause shown therefor."

Section 5. Section 15-35-202, MCA, is amended to read:

"15-35-202. New coal production incentive tax credit allowed—application limited. (1) A coal mine operator is entitled to a new coal production incentive tax credit *against* the tax imposed under 15-35-103 *of:*

(a) 33⅓% for incremental production sold during calendar years 1985 and 1986;

(b) 50% for incremental production sold from January 1, 1987, until June 30, 1988; and

(c) 40% for incremental production sold from July 1, 1988, until June 30, 1990; provided, however, that if the production quota established in 15-35-103(2)(a)(i) is not met, the tax credit for this period is 50% for fiscal year 1989 and 40% for fiscal year 1990.

(2) *(a)* A coal mine operator is entitled to a new coal production incentive tax credit *against* the tax imposed under 15-35-103 on incremental production for the entire term of an agreement, except as provided in subsection (3), if the incremental production resulted from coal purchases under:

(i) an existing agreement which was extended between January 1, 1985, and *December 31, 1988,* for at least a 5-year period; or

(ii) a new agreement that was executed between January 1, 1985, and *December 31, 1988.*

(b) The rate of credit allowed under subsection (2)(a) is:

(i) 33⅓% for incremental production sold from January 1, 1985, until December 31, 1986;

(ii) 50% for any incremental production sold from January 1, 1987, until June 30, 1988;

(iii) 40% for any incremental production sold from July 1, 1988, until June 30, 1990. However, if the production quota established in 15-35-103(2)(a)(i) is not met, the tax credit for this period is 50% for fiscal year 1989 and 40% for fiscal year 1990.

(iv) 25% for any incremental production sold from July 1, 1990, until June 30, 1991; and

(v) 25% after June 30, 1991, if the production quota in 15-35-103(2)(a)(i) has not been met.

(3) No credit may be claimed for coal produced prior to January 1, 1985."

Section 6. Section 15-35-203, MCA, is amended to read:

"15-35-203. Calculation and application of credit. (1) The amount of new coal production incentive tax credit that a coal mine operator may claim against the tax imposed in 15-35-103 is calculated by:

(a) determining the incremental production for each of his qualified purchasers that was produced during a calendar year;

(b) distributing the incremental production among the quarters in the calendar year in the same proportion as the total volume of coal sold each quarter to each respective purchaser and summing the amounts for all purchasers to determine the coal mine operator's incremental production for each quarter;

(c) determining the arithmetic average severance tax per ton calculated prior to application of the credit on coal sold to each qualified purchaser *each quarter* during the calendar year;

(d) multiplying the incremental production for a *quarter* for a purchaser by the average severance tax per ton for that purchaser and multiplying the total by *the approporiate percentage as provided in 15-35-202 for each quarter*; and

(e) totaling the amount so calculated for all qualified purchasers *for all four quarters of the calendar year.*

(2) When filing the quarterly statement required in 15-35-104, a coal mine operator may claim against the coal severance tax calculated for that quarter an amount equal to 25% of the new coal production incentive tax credit allowed on incremental production that occurred during the previous calendar year.

(3) If in any calendar year a purchaser exceeds his base consumption level and he has purchased from more than one Montana coal mine operator during the year, the credit on the incremental production must be divided among the operators on a pro rata basis. To determine each coal mine operator's pro rata share of the tax credit, each operator shall divide his incremental production by the sum of all coal mine operators' incremental production for that purchaser and multiply the quotient by the purchases in excess of the base consumption level for that purchaser.

(4) Neither a coal mine operator nor a purchaser is entitled to a direct payment for the credit allowed in 15-35-202. A credit terminates if not taken during the year following the year in which the incremental production occurred.

(5) Each coal mine operator must reduce the delivered price of coal sold to each qualified purchaser by an

amount equal to the credit received on incremental production sold to that purchaser."

Section 7. Extension of authority. Any existing authority of the department of revenue to make rules on the subject of the provisions of this act is extended to the provisions of this act.

Section 8. Applicability. Sections 2 and 5 apply retroactively, within the meaning of 1-2-109, to tax periods beginning after December 31, 1986.

Section 9. Effective date. This act is effective July 1, 1987.

28. 1987 Montana Laws, ch. 662 (Sections 1 and 15)

AN ACT TO GENERALLY REVISE FOR FISCAL YEARS 1987, 1988, AND 1989 THE ALLOCATION OF THAT PORTION OF THE COAL SEVERANCE TAX PROCEEDS AND INTEREST NOT CONSTITUTIONALLY DEDICATED TO THE PERMANENT TRUST; CREATING SEPARATE LOCAL IMPACT AND EDUCATION TRUST ACCOUNTS; AMENDING SECTIONS 15-35-108, 17-5-704, 20-9-343, 90-2-124, 90-6-202, 90-6-205, 90-6-207, AND 90-6-211, MCA; AND PROVIDING AN APPLICABILITY DATE AND EFFECTIVE DATES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 15-35-108, MCA, is amended to read:

"15-35-108. Disposal of severance taxes. *Severance taxes collected under this chapter must be allocated according to the provisions in effect on the date the tax is due under 15-35-104.* Severance taxes collected under the provisions of this chapter are allocated as follows:

(1) To the trust fund created by Article IX, section 5, of the Montana constitution, 50% of total coal severance tax collections. The trust fund moneys shall be deposited in the fund established under 17-6-203(5) and invested by the board of investments as provided by law.

(2) Starting July 1, 1987, and ending June 30, 1993, 12% of coal severance tax collections are allocated to the highway reconstruction trust fund account in the state special revenue fund.

(3) Coal severance tax collections remaining after the allocations provided by subsections (1) and (2) are allocated in the following percentages of the remaining balance:

(a) 4½% to the state special revenue fund to the credit of the alternative energy research development and demonstration account;

(b) *4%* until *June 30, 1989, to the state special revenue fund to the credit of the local impact account* and thereafter *20%* to the state special revenue fund to the credit of the local impact and education trust fund account *and 17.5% to the credit of the local impact account. Unencumbered funds remaining in the local impact account at the end of each biennium are allocated to the education trust fund account*;

(c) *44.2%* until *June 30, 1989,* and thereafter 10% to the state special revenue fund for state equalization aid to public schools of the state;

(d) 1% to the state special revenue fund to the credit of the county land planning account;

(e) 1¼% to the credit of the renewable resource development bond fund;

(f) after June 30, 1989, 5% to a nonexpendable trust fund for the purpose of parks acquisition or management, protection of works of art in the state capitol, and other cultural and aesthetic projects. Income from this trust fund shall be appropriated as follows:

(i) ⅓ for protection of works of art in the state capitol and other cultural and aesthetic projects; and

(ii) ⅔ for the acquisition, development, operation, and maintenance of any sites and areas described in 23-1-102;

(g) 1% to the state special revenue fund to the credit of the state library commission for the purposes of pro-

viding basic library services for the residents of all counties through library federations and for payment of the costs of participating in regional and national networking;

(h) ½ of 1% to the state special revenue fund for conservation districts;

(i) 1¼% to the debt service fund type to the credit of the water development debt service fund;

(j) 2% to the state special revenue fund for the Montana Growth Through Agriculture Act;

(k) all other revenues from severance taxes collected under the provisions of this chapter to the credit of the general fund of the state."

Section 15. Effective date. (1) Sections 2, 8, 14, and this section are effective on passage and approval.

(2) All other sections are effective July 1, 1987.

29. Senate Report No. 985, 75th Cong., 1st Sess. (1937)

LEASING INDIAN LANDS FOR MINING PURPOSES

JULY 22 (calendar day, JULY 28), 1937.—
Ordered to be printed

MR. THOMAS of Oklahoma, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 2689]

The Committee on Indian Affairs, to whom was referred the bill (S. 2689) to regulate the leasing of certain Indian lands for mining purposes, having considered the same, report thereon with the recommendation that it do pass without amendment.

The proposed legislation was suggested by the Secretary of the Interior in a communication dated June 17, 1937, addressed to the President of the Senate, who referred the same to your committee for consideration; thereafter, your committee authorized the introduction of a bill (S. 2689) for the purpose of carrying out the wishes of the Secretary of the Interior, and thereupon said bill (S. 2689) was referred to your committee for further consideration.

The communication of the Secretary of the Interior, dated July 17, 1937, above referred to, is attached hereto and made a part of this report, as follows:

DEPARTMENT OF THE INTERIOR,
Washington, June 17, 1937.

THE PRESIDENT OF THE SENATE.

MY DEAR MR. PRESIDENT: I transmit herewith a proposed bill to govern the leasing of Indian lands for mining purposes.

Under section 26 of the act of June 30, 1919 (41 Stat. 31), as amended, leases for minerals other than oil and gas may be made on any reservation in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming. Under the provisions of section 3 of the act of February 28, 1891 (26 Stat. 785), as amended May 29, 1924 (43 Stat. 244), leases for oil, gas, and other minerals may be made with the consent of the tribal council on treaty reservations in all States. Section 16 of the Indian Reorganization Act, approved June 18, 1934 (46 Stat. 984), provides that organized Indian tribes shall have the power to prevent the leasing of tribal lands. Under section 17 of that act Indian tribes to which charters of incorporation issue are empowered to lease their lands for periods of not more than 10 years. There is at present no law under which Executive-order lands may be leased for mining, outside of the States mentioned in the act of June 30, 1919, except for oil and gas mining purposes, unless the tribes are hereafter qualified under sections 16 and 17 of the Indian Reorganization Act. One of the purposes of the legislation now proposed, therefore, is to obtain unformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes.

The act of June 30, 1919 requires the formal opening of lands for prospecting, location, and lease, by the Secretary of the Interior, before an application for a lease for minerals other than oil and gas can be considered. It also requires that a person desiring to lease shall locate the mining claims as under the United States mining laws, file formal location notice; and under the regulations he must have the lands surveyed if they have not already been surveyed, all in accordance with the mining laws applicable to the public domain. This frequently results in long delay and is often quite an expense to an applicant for a lease. Frequently we have requests for leases for the purpose of removing sand and gravel for road-grading purposes, or

for the quarrying of stone, either for building or grading purposes in connection with which there would be little or no under-surface workings. In such cases, applicants for leases are required to go through all the formality and expense necessary to acquiring actual mining leases. Sometimes the time and expense of making the locations and of having the land surveyed are more than they care to undertake although the material desired may be very conveniently located and could be profitably utilized; and consequently the opportunity to lease the land is lost and the revenue, while perhaps not a great deal in a particular instance would amount to considerable in such cases through the entire Indian Service.

Section 26 of the act of June 30, 1919, *supra*, as amended by the acts of March 3, 1921 (41 Stat. 1231), and December 16, 1926 (44 Stat. 922-923), places unallotted Indian lands within the States mentioned therein upon the same basis for prospecting and leasing for metalliferous minerals as lands of the public domain, after such Indian reservation lands have been declared opened by the Secretary of the Interior. It has been held that the Secretary of the Interior has no discretion under the said section in the matter of granting a lease to an applicant who has properly located his claim and complied with the laws and regulations of the Department thereunder; and in several instances it has been necessary to grant the lease notwithstanding the fact that the Indians of the reservation were opposed to leasing the lands. In other words, under that law, neither this Department nor the Indian Tribal Council is in a position to prevent the acquisition of a lease after the lands have been declared open to prospecting and lease, and the Indians at no time have any voice in the granting of such leases.

It is not believed that the present law is adequate to give the Indians the greatest return form their property. As stated, present law provides for locating and taking mineral leases in the same manner as mining locations are made on the public lands of the United States; but there are disadvantages in following this procedure on Indian

lands that are not present in applying for a claim on the public domain. For instance, on the public domain the discoverer of a mineral deposit gets extralateral rights and can follow the ore beyond the side lines indefinitely, while on the Indian lands under the act of June 30, 1919, he is limited to the confines of the survey markers not to exceed 600 feet by 1,500 feet in any one claim. The draft of the bill herewith would permit the obtaining of sufficient acreage to remove the necessity for extralateral rights with all its attending controversies.

The most urgent change is in the interest of leasing deposits of building stone, sand, gravel, and metalliferous minerals. For instance, the well-known iron deposit on the Fort Apache Indian Reservation, outcropping along the canyon wall for a distance of about 2 miles and 20 feet thick, with an estimated ore reserve of over 15 million tons, now must be "discovered" and located and monumented and then an application made for a lease. Under the present law only the outcrop along the canyon wall can be taken up under the lease as there are no outcrops of iron ore back from the face of the cliff. This deposit, it is believed, could be leased to better advantage at public auction and in definite areas rather than to anyone who erects a few monuments along the outcrop and applies for a preference right to a lease, through tieing up the land with a long strip 600 feet wide. This deposit of iron ore is about 30 miles from a railroad, and anyone interested and considering building a railroad and developing the property would want a reserve greater than 600 feet back from the edge of the cliff. This deposit should appropriately be laid out in blocks extending at least 1 mile back from the outcrop.

Coal deposits on the several reservations are not adaptable to the discovery and location feature of the present act, which has very limited application. The presence of coal is usually known by geological association, and leases may be made with reasonable assurance before any coal is actually exposed on the land. Deposits of marl along the west side of Pyramid Lake, Nev., can be seen for a distance of many miles, yet they must be "discovered" and "lo-

cated'' in accordance with the provisions of law relating to placer mining claims and leased to the person who erects monuments thereon. Deposits of sand, gravel, and building stone are now similarly leased, even though the deposits are well known and could be leased with greater advantage to the Indians in definite areas.

The attached draft of bill, it is believed, would be a more satisfactory law for the leasing of Indian lands for general mining purposes. It will bring all mineral leasing matters in harmony with the Indian Reorganization Act, and I recommend that it be enacted.

TheActing Director of the Bureau of the Budget has advised that there is no objection to the presentation of this report to the Congress.

Sincerely yours,

CHARLES WEST,
Acting Secretary of the Interior.

30. Senate Report No. 1508, 85th Cong., 2d Sess. (1958)

PROVIDING FOR THE RESTORATION TO TRIBAL OWNERSHIP OF ALL VACANT AND UNDISPOSED-OF CEDED LANDS ON CERTAIN INDIAN RESERVATIONS

APRIL 29, 1958.—Order to be printed

Mr. MURRAY, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany H. R. 8544]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H. R. 8544) to provide for the restoration to tribal ownership of all vacant and undisposed-of ceded lands on certain Indian reservations, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill, as amended, do pass.

The amendment is as follows:

On page 1, strike the words "Crow, Montana" and the figure "5,480.95" and insert in lieu thereof the words "Crow, Montana" and the figure "10,260.95".

EXPLANATION OF THE BILL

The purpose of H. R. 8544, is to provide for equality of treatment in the restoration to tribal ownership of approximately 70,320 acres of surplus lands on the Klamath River, Calif.; Coeur d'Alene, Idaho; Crow, Mont.; Fort

Peck, Mont.; and Spokane, Wash., reservations. No appropriation of Federal funds is requested.

The bill will restore to the five named tribes ownership of the undisposed-of acreages that were ceded to the United States by the listed tribes pursuant to various statutes and agreements. In general, these statutes provided that the Government would dispose of the ceded lands through homesteading or otherwise and deposit the net proceeds in the Federal Treasury to the credit of the tribes concerned. These sales' proceeds were to be the only compensation to the Indians for the ceded lands.

Through departmental orders issued in 1934 and 1935, all ceded lands not theretofore disposed of were temporarily withdrawn from further disposition until the matter of their restoration to tribal ownership could be given further consideration. Undisposed-of ceded lands were restored to the tribes which accepted the Indian Reorganization Act of 1934. Undisposed-of ceded lands of tribes which did not accept the Indian Reorganization Act have remained temporarily withdrawn since 1934. Approximately 3 million acres have been restored to the various tribes on 26 reservations while the acreage not restored amounts to approximately 70,320 widely scattered on the Klamath River, Coeur d'Alene, Crow, Fort Peck, and Spokane Reservations, the only ones known to have undisposed-of ceded lands.

This legislation, if enacted, will restore the lands to tribal ownership, thus terminating the right of the Federal Government to dispose of them under the cession statutes, and will assure the Indians the continued use rights.

In a series of cases (*United States v. Brindle,* 110 U. S. 688, 690, 693; *Minnesota v. Hitchcock,* 185 U. S. 373, 394-395; *United States v. Mille Lac Chippewas,* 229 U. S. 498, 509; *Ash Sheep Co. v. United States,* 252 U. S. 159, 164-166) the Supreme Court of the United States has held that this land continued in the beneficial ownership of the Indians even though they had ceded "all their right, title, and interest." So the net effect of H. R. 8544 is to clarify the Indian title to these lands in order that they may be managed and administered by the tribes.

H. R. 8544 provides that restoration shall not apply to any lands while they are within reclamation projects heretofore authorized. It also provides that the lands to be restored shall be held by the United States and the existing reservations for the tribes. Finally, the bill provides that the tribes are authorized to sell or exchange the restored lands, with the approval of the Secretary of the Interior.

The report of the Secretary of the Interior dated June 25, 1957, on S. 1757, a companion bill to H. R. 8544, is set forth below:

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., June 25, 1957.

Hon. JAMES E. MURRAY,

Chairman, Committee on Interior and Insular Affairs,
United States Senate, Washington, D. C.

DEAR SENATOR MURRAY: Your committee has requested a report on S. 1757, a bill to provide for equality of treatment in the restoration to tribal ownership of surplus lands, and for other purposes.

We recommend that the bill be enacted if it is amended as suggested below.

The bill restores to tribal ownership the undisposed-of lands that were ceded to the United States by the tribes listed in the bill pursuant to various statutes and agreements. In general, these statutes provided that the Government would dispose of the ceded lands and deposit the net proceeds of sales in the United States Treasury to the credit of the tribes concerned. These sales' proceeds were to be the only compensation to the Indians for the ceded lands.

By departmental orders of September 19, 1934, and November 5, 1935, all undisposed-of ceded lands of these and other tribes were temporarily withdrawn from further disposition until the matter of their restoration to tribal ownership could be given appropriate consideration. A departmental order of November 2, 1934, took similar action with respect to unsold lots in various townsites within the reservations. The undisposed-of ceded lands that elected to come under the Indian Reorganization Act were restored to them pursuant to section 3 of that act (act of June 18, 1934, 48 Stat. 984, 25 U. S. C. 463), and the undisposed-of ceded lands of tribes that did not come under the Indian Reorganization Act have remained temporarily withdrawn for the past 22 years. The lands on the Colville Reservation were restored in 1956 by special legislation (act of July 24, 1956, 70 Stat. 626). The acreage that has been restored to the various tribes amounts to approximately 3 million acres on 26 reservations: the acreage that has not been restored amounts to approximately 65,419 acres on 5 reservations.

The tribes listed in the bill include all of the tribes that are known to have undisposed-of ceded lands.

The Indians have never been paid for these ceded lands and they have from time to time passed resolutions requesting the enactment of legislation to restore the lands to them.

The lands are for the most part scattered over wide areas, some inside and some outside the present boundaries of the reservations. A restoration of the lands to tribal ownership will terminate the right of the Federal Government to dispose of them under the cession statutes, and will assure the Indians of the continued use of the lands. This will permit the Indians to improve the lands so that they may be operated or leased to their highest and best use, and will facilitate administration of the areas.

Any valid existing rights of bona fide entrymen will not be affected by the enactment of the bill, and lands that are now within reclamation projects heretofore authorized will not be restored.

We recommend that the bill be amended to conform to the draft bill enclosed with this report. With one exception (par. 5 below), the changes relate to matters of form and do not affect the substance of the bill. They are as follows:

1. The lands are identified as vacant and undisposed-of ceded lands (including townsite lots), rather than as surplus ceded lands of the class referred to in section 3 of the Indian Reorganization Act. The more specific reference avoids the necessity for across reference.

2. The acreage of the Klamath River Reservation is 159.57 acres rather than 128.84 acres.

3. The exception with respect to reclamation projects is limited to the time the lands remain within the boundaries of the projects.

4. The lands are made a part of the existing reservation for the tribes.

5. The tribes are authorized to sell or exchange the restored lands, with the approval of the Secretary of the Interior. In the case of the Crow Tribe, the restored lands are outside the boundaries of the diminished reservation and the tribe has indicated that it will probably want to negotiate sales or exchanges in order to make the best use of the lands. The other tribes may encounter the same need.

The Bureau of the Budget has advised us that there is no objection to the submission of this report to the Congress.

Sincerely yours,

ROGER ERNST,
Assistant Secretary of the Interior.

A BILL To provide for the restoration to tribal ownership of all vacant and undisposed-of ceded lands on certain Indian reservations, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That all lands now or hereafter classified as vacant and undisposed-of ceded lands (including townsite lots) on the following named Indian reservations are hereby restored to tribal ownership, subject to valid existing rights:

Reservation and State:	*Approximate acreage*
Klamath River, California	159.57
Coeur d'Alene, Idaho	12,877.65
Crow, Montana	5,480.95
Fort Peck, Montana	41,450.13
Spokane, Washington	5,451.00

Provided, That such restoration shall not apply to any lands while they are within reclamation projects heretofore authorized.

SEC. 2. Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made a part of the existing reservations for such tribe or tribes.

SEC. 3. The lands restored to tribal ownership by this Act may be sold or exchanged by the tribe, with the approval of the Secretary of the Interior.

Subsequent to the passage of H. R. 8544 in the House, officials of the Department of the Interior informed the committee that the acreage of ceded lands to be restored to the Crow Indians of Montana was not accurate. A supplemental statement furnished the committee by the Solicitor's Office, Department of the Interior, explaining the need for the amendment which the committee has adopted, is as follows:

H. R. 8544

Amend the approximate acreage schedule on page 1 by changing "5,480.95" to "10,260.95".

EXPLANATION

The bill restores all vacant and undisposed-of ceded lands on the Crow Reservation, but the restora-

tion of any ceded lands within a reclamation project will not become effective until the reclamation withdrawal is canceled.

The 5,480.95 acres listed for the Crow Reservation include only 120 of the approximate 4,900 acres of ceded lands in the Huntley reclamation project. Those 120 acres were included by inadvertance at a time when the bill did not purport to apply to any ceded lands in a reclamation project. When the language of the bill was changed to apply to all ceded lands, but to defer the effective date of the restoration of ceded lands in a reclamation project until the reclamation withdrawal is canceled, the acreage figure was not changed to reflect that fact.

The amendment proposed will make the acreage figure in the schedule factually accurate by including the entire 4,900 acres of ceded land in the Huntley project.

This change will not in any way conflict with a separate bill relating to the Huntley ceded lands that is still pending before the Indian Affairs Subcommittee (H. R. 9617). That bill provides for Federal purchase of the tribe's rights in the ceded lands within the Huntley project, and for the disposal of the lands under the reclamation laws. This will convert the present executive withdrawal into a statutory withdrawal, and the lands could never be restored under H. R. 9617. Of course if H. R. 9617 should not be enacted, the lands would be subject to H. R. 8544.

The committee recommends the enactment of H. R. 8544, as amended.

31. Statement of Edward P. Whiteman, Chairman of the Crow Indian Tribal Council in Support of H. R. 8544, to restore to ownership 5,480.95 Acres of Vacant and Undisposed-of Ceded Lands on the Crow Indian Reservation (Trial Exhibit D-328)

MR. CHAIRMAN AND GENTLEMEN OF THE COMMITTEE:

On behalf of the Crow Tribe of Indians of Montana, I respectfully request that the committee recommend the passage of H. R. 8544 in its original form as introduced by Congressman Metcalf of Montana. Many years ago the 5,480.95 acres of land referred to in the Bill were ceded to the government by the Crow Tribe with the understanding that the lands would be disposed by the government and the net proceeds of the sale deposited in the United States Treasury to the credit of the Crow Tribe. It was originally understood by the Indians in the negotiation with the government that the land would be disposed of and the income derived from the same placed in such funds as would benefit the members of the Crow Tribe. The 5,480.95 acres, which has not been disposed of by the government, consists of numerous tracts of land located in Big Horn County, Yellowstone County and Treasure County, Montana. The numerous tracts of land are not adjacent to each other but are isolated, and since 1934 and 1935, at which time departmental orders were made withdrawing the lands from disposition, there has been very little, if any, income from these lands. The title to the lands has always been in question and of course the lands could not be disposed of by sale, lease or otherwise, except by complicated proceedings.

During the past 6 or 7 years, numerous tracts of land in the immediate area where the lands in question are lo-

cated have been leased for oil and gas purposes and large bonuses and rental payments have been made by interested oil companies, as lessees of such lands. Because of the complicated situation relative to the title in and to the lands in question, large portions of the 5,480.95 could not be leased for oil and gas purposes. This has caused a serious financial loss to the Crow Tribe, as it is fully evident that lease rentals and lease bonuses would have been greater than the value of the lands, and the Indians would still have retained the title to the same.

The lands have always belonged to the Crow Tribe and the title to the same should be restored to the Crow Tribe. I respectfully request the committee recommend the passage of H. R. 8544.

Respectfully submitted,

/s/ EDWARD P. WHITEMAN
Chairman of the Crow Indian
Tribal Council

32. 1985 Memorandum of Understanding

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU") is entered into between the United States Department of the Interior (the "Department"), acting by and through the Director of the Office of Surface Mining Reclamation and Enforcement (the "Director"), and the State of Montana (the "State"), acting by and through the Commissioner of State Lands (the "Commissioner").

Whereas, on September 28, 1984, the Secretary of the Interior promulgated an Indian Lands Program to implement the requirements of the Surface Mining Control and Reclamation Act of 1977 for the regulation of surface coal mining on Indian lands;

Whereas, the State of Montana has applied its surface mining control laws to coal mining on the Crow Ceded Area within the State, and has issued permits and revisions thereto to the operator;

Whereas, the Secretary and the State of Montana are desirous of avoiding duplication of effort and burdensome and unnecessary administrative requirements relating to coal mining on the Crow Ceded Area, while maximizing coal production consistent with environmental protection;

Whereas, the Secretary of the Interior and State of Montana recognize that it is in their mutual interest to coordinate the administration of applicable surface mining requirements on the Crow Ceded Area;

Accordingly, they have entered into this Memorandum of Understanding for the purpose of coordinating

the administration of all surface coal mining requirements to an operator on the Crow Ceded Area.

ARTICLE I. INTRODUCTION AND PURPOSE

A. The parties intend that this MOU shall govern the regulation of operations subject to this MOU, as herein defined, by providing for the cooperative implementation of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. *et seq.* (the "Federal Act"), the Federal Program for Indian Lands, 30 C.F.R. Part 750 (the "Federal Program"), and the Montana Strip and Underground Reclamation Act, Montana Code Annotated 82-4-201 *et seq.*, and the regulations promulgated thereunder (the "State Provisions"), with respect to such operations.

B. The purpose of this MOU is to (1) foster State-Federal cooperation in the regulation of surface coal mining and reclamation operations on the Crow Ceded Area; (2) eliminate unnecessary intergovernmental overlap and duplication; and (3) provide effective regulation of operations subject to this MOU.

C. Nothing herein shall be construed as delegating to the State of Montana the Secretary's responsibilities for the regulation of surface coal mining and reclamation operations.

ARTICLE II. EFFECTIVE DATE

This MOU is effective upon its signing by the Director and the Commissioner, and shall remain in effect unless terminated in accordance with Article IX.

ARTICLE III. SCOPE

In order to provide for consistent regulation of operations subject to this MOU with that required on state-owned lands within the Crow Ceded Area, all operations subject to this MOU shall comply with all State Provisions that are no less stringent than the Federal Program and, in addition, shall comply with all provisions of the Federal Program that are more stringent than the corresponding State Provisions and with all terms and conditions of valid federal and state mining permits, *provided,* that the Department, together with the State, will from time to time set out as addenda to this MOU any provision of the Federal Program that is more stringent, and the corresponding state provision; *provided, further,* that in making these determinations the parties shall be guided by the provisions of sections 505 and 710(d) of the Federal Act and the Department's regulations at 30 C.F.R. 730.5 and 730.11.

ARTICLE IV. RESPONSIBLE ADMINISTRATIVE AGENCIES

A. The Montana Department of State Lands ("DSL") shall be the agency responsible for administration of this MOU on behalf of the State of Montana.

B. The Office of Surface Mining Reclamation and Enforcement ("OSM") shall be the agency responsible for administration of this MOU on behalf of the Department.

ARTICLE V. PERMIT APPLICATIONS

A. *Valid Permit Required.* No operations subject to this MOU shall be conducted unless the operator shall have

first been issued permits requiring compliance with the Montana State Provisions and the Indian Lands Program. Any permits approved and in effect on the effective date of this MOU shall remain in full force and effect during the remainder of their approved terms and shall be administered and enforced in accordance with the provisions of this MOU.

B. *Contents of Permit Applications.* The parties agree and hereby require that an operator shall submit an identical permit application, or an application for a major modification to an approved permit, in an appropriate number of copies to DSL and OSM. This same requirement applies to supplementary or up-dated information. The permit application shall be in the form required by DSL. The application shall include the information required by, or necessary for, DSL and OSM to make a determination of compliance with:

1. Section 82-4-222 MCA;

2. Title 26, Chapter 4, Subchapter 3, Administrative Rules of Montana;

3. Provisions of 30 C.F.R. 750.12; and

4. Applicable requirements of other federal laws and regulations and the State Provisions.

C. *Permit Application Review Procedures.*

1. DSL shall assume lead responsibility for the analysis and review of permit applications required by this MOU. OSM shall, as requested, assist DSL in such analysis and review. OSM shall, in addition, evaluate DSL's analysis and conclusions as necessary to determine independently whether OSM concurs in DSL's decision.

2. DSL shall be the principal point of contact for the operator regarding the processing of permit applications, and shall be responsible for informing the applicant of all joint State-Federal determinations. Each party shall send to the other a copy of all correspondence with, and any information received from, the applicant that may have a bearing on decisions regarding the permit application.

3. Upon receipt of a permit application, OSM shall identify a person as the OSM Application Manager. The OSM Application Manager shall serve as the primary point of contact between OSM and DSL throughout the review process and shall be responsible for identifying areas of avoidable duplication of review and analysis. Not later than 90 days after an application has been received, OSM and DSL shall meet to discuss the application and agree upon a work plan and schedule for the review of the application. OSM shall also inform DSL of any specific or general area of concern as to which OSM recommends special handling or analysis. DSL shall inform OSM of any assistance requests to perform any specific or general analyses or to prepare any studies or similar work.

4. Any required environmental assessment and impact statement shall be prepared in accordance with 40 C.F.R. 1506.2, and DSL and OSM shall cooperate to the fullest extent possible to produce a single assessment or statement for a permit application.

5. Unless the work plan provides otherwise, DSL shall prepare a technical analysis, environmental analysis, and proposed written decision on the permit application.

Copies of drafts of such documents shall be sent to OSM for review and comment. OSM shall evaluate the documents and, within 30 days, inform DSL of any recommended changes. DSL shall consider the comments of OSM and prepare a final technical analysis and environmental analysis. Promptly thereafter, OSM and DSL shall each issue a written decision. The parties shall endeavor to act within 45 days.

D. PERMIT APPLICATIONS FEES.

In the event that OSM promulgates a final rule requiring the payment of permit application fees, the parties shall promptly amend this MOU, as necessary, to provide for coordination of permit fees with a view toward avoiding unnecessary and duplicative fees.

E. MINOR REVISIONS AND ANNUAL REPORTS.

1. An operator shall file any request for a minor revision to a permit with DSL and shall provide a copy to OSM. DSL shall review the request and shall inform OSM whether it intends to approve or disapprove the minor revision and shall coordinate with OSM concerning OSM's approval of such revision.

2. An operator shall file annual reports with DSL and OSM as required by the Montana State Provisions in the form required by DSL.

ARTICLE VI. INSPECTIONS

A. DSL shall conduct inspections of operations subject to this MOU and prepare and file inspection reports in accordance with the Montana State Provisions.

B. DSL shall, within 15 days of conducting any inspection under this MOU, file with OSM an inspection report describing (1) the general conditions of the lands on which operations subject to this MOU are being conducted; (2) the manner in which such operations are being conducted; and (3) whether the operator is complying with applicable performance and reclamation requirements.

C. DSL will be the point of contact and lead inspection authority in dealing with the operator concerning operations and compliance with requirements pursuant to this MOU.

D. The Department may conduct any inspections necessary to carry out any of its obligations under the Federal Act, its rules, regulations and Indian Lands Program, and any other obligations it may have under laws other than the Federal Act.

E. OSM shall give DSL reasonable notice of its intent to conduct an inspection in order to provide DSL with an opportunity to join in the inspection. If OSM responds to a citizen complaint of an imminent environmental danger or threat to human health, it will contact DSL no less than 24 hours prior to the federal inspection, if practicable to facilitate a joint inspection. OSM shall provide DSL with a copy of any inspection report prepared as a result of any OSM inspection.

F. DSL and OSM personnel shall be mutually available to serve as witnesses in enforcement actions taken by either party.

G. Nothing herein shall be interpreted as precluding a member of the Crow Tribe from accompanying federal inspectors.

ARTICLE VII. ENFORCEMENT

A. DSL shall enforce the Montana State Provisions and this MOU with respect to operations subject to this MOU.

B. During any joint inspection by OSM and DSL, DSL shall take enforcement action concerning any violation observed, including issuance of orders of cessation and notices of violation; provided, however, that nothing herein precludes the Secretary from taking appropriate enforcement action. OSM and DSL shall consult prior to issuance of any decision to suspend or revoke a permit.

C. DSL and OSM shall promptly notify each other of all violations of applicable laws, regulations, orders, approved mining and reclamation plans and permits concerning operations subject to this MOU and of all actions taken with respect to such violations.

ARTICLE VIII. BONDS

A. DSL and OSM may require the operator to obtain a single performance bond to cover the operator's responsibilities under the State Provisions and the Federal Program, payable to both the State of Montana and the United States of America. Such bond shall be of sufficient amount to ensure compliance with obligations under both State and Federal law, and release of such bond shall be conditioned upon compliance with all applicable requirements.

B. Prior to releasing the operator from an obligation under a performance bond pursuant to this MOU, DSL will obtain the concurrence of OSM. DSL shall also advise OSM of any adjustments to the bond.

ARTICLE IX. TERMINATION

A. This MOU may be terminated by the State upon 90 days written notice to the Secretary.

B. This MOU may be terminated by the Secretary upon 90 days written notice of a finding that the State has failed to comply with the requirements of this MOU, or of any undertaking by the State upon which this MOU is based, *provided, however,* that no finding provided for in this paragraph shall be made until the State shall have first been given notice of, and an opportunity for an informal conference concerning, such proposed finding.

C. This MOU shall terminate upon the:

1. termination or withdrawal of approval of the Montana permanent regulatory program, 30 C.F.R. 926.10;

2. enactment of a federal statute specifying the governmental agency or other entity with the power and responsibility to regulate surface coal mining and reclamation operations on the Crow Ceded Area in a manner inconsistent with this MOU; or

3. termination of all operations subject to this MOU.

D. Four years from the effective date hereof, and every four years thereafter, this MOU shall be subject to review by the parties.

ARTICLE X. REINSTATEMENT

If this MOU has been terminated in whole or in part, under the terms of Article IX, it may be reinstated if the State submits evidence and OSM finds that the cause of termination has been remedied.

ARTICLE XI. AMENDMENTS TO MEMORANDUM OF UNDERSTANDING

This MOU may be amended by mutual agreement of the Department and the Sstate.

ARTICLE XII. CHANGES IN STATE OR FEDERAL STANDARDS

A. The Department or the State may from time to time promulgate new or revised requirements concerning operations subject to this MOU. The Department and the State shall immediately inform each other of any proposed or final changes in their respective laws or regulations. Notwithstanding any such change in the laws or regulations of either party, the State Provisions shall continue to apply to operations subject to this MOU, except as otherwise provided in accordance with Article III of this MOU.

B. The State and the Department shall provide each other with copies of any changes to their respective laws, rules, regulations, and standards pertaining to the enforcement and administration of this MOU.

ARTICLE XIII. RESERVATION OF RIGHTS

The MOU shall not be construed as waiving or preventing the assertion of any rights or responsibilities that have not been expressly addressed in this MOU that the State or the Department may have under other laws and regulations; nor shall this MOU be construed as a delegation of the Secretary's authority under the Surface Mining Control and Reclamation Act of 1977, and its rules, to the State of Montana.

ARTICLE XIV. DEFINITIONS

A. The term "Crow Ceded Area" shall mean the area of land within the State of Montana, formerly a part of the Crow Indian Reservation, that was transferred to the United States by the Act of April 27, 1904, ch. 1624, 33 Stat. 352, except such lands as may have been reconveyed, granted, or transferred to the Crow Tribe of Indians.

B. The term "operations subject to this memorandum of understanding" shall mean surface coal mining and reclamation operations, as defined at 30 U.S.C. 1291 (27), that are being conducted within the Crow Ceded Area where the coal being mined is under lease from the Crow Tribe of Indians and all lands on which such operations are or may be conducted throughout the remaining active life of such operations.

C. The term "operator" shall mean a person who conducts operations subject to this MOU.

ARTICLE XV. RELATIONSHIP TO OTHER MATTERS

No provision of this MOU is intended to affect in any way:

(a) any entitlement to reclamation fees paid or to be paid into the Abandoned Mine Reclamation Fund for coal produced from operations subject to this MOU pursuant to the provisions of Title IV of the Surface Mining Control and Reclamation Act of 1977:

(b) the validity or invalidity of the Montana Coal Severance Tax as applied to the mining of coal at operations subject to this MOU; or

(c) the position of any party to this MOU concerning whether (1) the lands within the Crow Ceded Area are "Indian Lands" as that term is defined in 30 U.S.C. 1291(9); (2) OSM has authority to promulgate the Federal Program for Indian Lands; (3) the Federal Program for Indian Lands applies to any lands within the Crow Ceded Area; or (4) Montana may apply its state program to the Crow Ceded Area.

DEPARTMENT OF THE INTERIOR

/s/ JED O. CHRISTENSEN
Director, Office of Surface Mining, Reclamation and Enforcement

STATE OF MONTANA

/s/ JOHN F. NORTH, Acting Commissioner of State Lands

/s/ A. RAYMOND RANDOLPH
A. Raymond Randolph, Esquire
Special Assistant Attorney General of the State Montana

Dated: August 12, 1985

Supreme Court, U.S.
FILED
OCT 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-343

In The

Supreme Court of the United States

October Term, 1987

STATE OF MONTANA; JOHN D. LaFAVER, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; TREASURE COUNTY, Montana, YELLOWSTONE COUNTY, Montana; LORRAINE HAMILTON, Treasurer, Big Horn County, Montana; KATHLEEN THOMAS, Treasurer, Treasure County, Montana; and MAY JENKINS, Treasurer, Yellowstone County, Montana,

Appellants,

vs.

CROW TRIBE OF INDIANS; UNITED STATES OF AMERICA; and WESTMORELAND RESOURCES, INC.,

Appellees.

ON APPEAL FROM THE NINTH CIRCUIT COURT OF APPEALS

MOTION TO AFFIRM

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In The

Supreme Court of the United States

October Term, 1987

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STATE OF MONTANA, *et al.*,

Appellants,

v.

CROW TRIBE OF INDIANS, *et al.*,

Appellees.

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ON APPEAL FROM THE NINTH CIRCUIT COURT OF APPEALS

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MOTION TO AFFIRM

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Pursuant to Rule 16.1 of the Rules of this Court, the Crow Tribe of Indians moves that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

———o———

OPINION BELOW

The opinion of the court of appeals (App. 1a-21a) is reported at 819 F.2d 895. The opinion of the district court (App. 22a-74a) is not reported. The opinion of the court of appeals in a previous appeal (App. 79a-106a) is report-

ed at 650 F.2d 1104, *amended*, 665 F.2d 1390, *cert. denied*, 459 U.S. 916. The district court's first decision in the case is reported at 469 F. Supp. 154.

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JURISDICTION

The judgment of the court of appeals was entered on June 11, 1987. The notice of appeal to this Court was filed on June 24, 1987 (App. 107a-109a), and the jurisdictional statement was filed on August 28, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

—o—

STATEMENT OF THE CASE

Vast reserves of coal underlie the eastern portion of the Crow Indian Reservation and the area immediately to the north of the acknowledged reservation known as the ceded strip.[1] App. 25a. Coal is the Tribe's primary asset; its development is the key to alleviating the severe poverty of the Crow Tribe and its members and putting the tribal government on a sound economic footing. Since 1967, the Secretary of the Interior has been actively involved in the development of the Tribe's coal resources.

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[1]The undisposed coal reserves within the ceded strip constitute part of the Crow Reservation. App. 7a. The ceded strip minerals have always been "reserved" for the Crow Tribe in one form or another. See, App. 26a-32a.

App. 46a; I Tr. 46-52; Ex. 42 at I-1, IV-1 to IV-11; Ex. D-344 at 18-19, 20-25.

In 1972, Westmoreland Resources, Inc., a non-Indian company, entered into two leases with the Crow Tribe to mine coal underlying the "ceded strip" in Big Horn County pursuant to the Indian Mineral Leasing Act of 1938. App. 32a, 45a. Westmoreland has been producing and selling tribal coal since that time. App. 33a. Virtually all of Westmoreland's production has been sold to four midwestern utilities through long-term contracts which expire in 1993. *Ibid.*

In 1975, the State of Montana enacted statutes that impose on coal mine operators a severance tax on each ton of coal produced in the State and a gross proceeds tax on the sale of each ton of coal. App. 46a. Montana's coal taxes with an effective rate of 32.9 percent are the highest in the nation, more than twice as high as the next highest state, Wyoming. Ex. 42 at I-6. Westmoreland Resources has been paying Montana's severance and gross proceeds taxes since 1975. App. 54a.

Between 1976 and 1982, Westmoreland paid approximately $53,800,000 in severance and $8,100,000 in gross proceeds taxes on the production and sale of Crow coal. App. 5a. During the same period, Westmoreland paid the Crow Tribe $14,400,000 in royalties. Ex. 42 at I-9. In addition, Westmoreland and Morrison-Knudsen, the contract mine operator for the Westmoreland mine, paid state income and property taxes. These payments amounted to more than $3 million from 1976 to 1982. Ex. 42 at I-13; III Tr. 396-98. Westmoreland also paid $.5 million in re-

source indemnity taxes.[2] Ex. 42 at I-13. In sum, excluding state and local taxes paid by mine employees, the State of Montana and Big Horn County have received approximately 4½ times more in revenues from the Westmoreland mine than has the Crow Tribe. Ex. 42 at xiv.

In January 1976, the Tribe enacted its own Coal Tax Code which provides for a tax of 25% of the value of coal mined by the Tribe's lessees. App. 53a. The Interior Department approved the Code as applicable to coal mined on the Crow reservation, but not to the Tribe's coal on the ceded strip owing to a limitation in the Crow Constitution. App. 6a. That tax has not been applied to nor collected from any coal producer. App. 54a.

Westmoreland and the Tribe agreed to an amendment to their lease, effective September 1982, which was approved by the Department of the Interior and provides that Westmoreland will pay the Tribe severance and gross proceeds taxes equal to the amount of Montana's taxes but not in excess of the Tribe's taxes. In turn, the Tribe agreed that the amount of tribal taxes payable by Westmoreland would be offset by the amount of severance and gross proceeds taxes that Westmoreland is required to pay Montana. App. 54a.

In 1980, the Crow Tribe and Shell Oil Company entered into a coal mining agreement covering approximate-

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[2]Montana's resource indemnity trust tax of .5 percent of the value of all minerals mined in the state is held in a segregated trust account "to improve the total environment and rectify damage thereto." Mont. Code Ann. Secs. 15-38-104, 15-38-203. The Crow Tribe has not challenged the application of this tax to its coal resources .

ly 9500 acres in the southeastern corner of the Crow Reservation. App. 33a. The agreement was approved by the Secretary of Interior in April 1983, under the authority of the Indian Mineral Development Act. Ex. 410; I Tr. 52-55. To avoid double taxation, Shell agreed to pay the Crow Tribe "an amount equal to the Montana state severance tax existing at the time (currently 30 percent of sales price excluding taxes based on production) less whatever is required to be paid to the State of Montana." Ex. 78 at 72.

Shell has been unable to market Crow coal due, in large measure, to the potential applicability of Montana's coal taxes—taxes which are not imposed on the Wyoming coal with which it competes. App. 6a; I Tr. 158-67; IV Tr. 577; Ex. 42 at III-20-26. Shell surrendered its rights in December, 1985. App. 6a.

Modern day surface mining of coal is capital rather labor intensive. Westmoreland and its mining contractor employ 112 people to mine approximately 40 acres a year. II Tr. 251-252. Fifty-five percent of the 72 hourly workers are either Crow Indians or married to Crow Indians. II Tr. 253. Most of the employees reside in the Town of Hardin or on the Crow Reservation. II Tr. 254-55.

The direct governmental cost attributable to the mining of Crow coal by Westmoreland Resources, Inc. amounted to $38 million between 1970 and 1982. For the same period state, local and excise taxes, other than the coal taxes, yielded Montana state and local governments with $42 million. App. 16a. As of 1981, Montana allocated 8.75% of its severance tax revenue to environmental or coal related services. *Ibid.*

In 1978 the Crow Tribe brought this suit against the State of Montana and the treasurers of Big Horn, Yellowstone, and Treasure Counties, seeking declaratory and injunctive relief against the imposition of Montana's severance and gross proceeds taxes on the production and sale of Crow coal. Westmoreland, the only producer of Crow coal, intervened. The United States District Court for the District of Montana dismissed the Tribe's Complaint for failure to state a claim upon which relief could be granted.

The court of appeals reversed and remanded. This Court denied Montana's Petition for Certiorari. Following remand, the United States intervened on the Tribe's behalf. After trial, the district court entered judgment in favor of Montana. The court of appeals reserved. Montana then appealed to this Court.

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ARGUMENT

1. Montana claims that a substantial federal question is presented as to state authority to tax tribally owned minerals located outside the boundaries of a reservation. That question, however, is not presented by the facts of this case.

The tribally owned coal which Montana seeks to tax is located in an area known as the Crow ceded strip. The background of the creation of the ceded strip through the 1904 cession of Crow Reservation land and the subsequent restoration of the land and minerals to tribal ownership

is set forth in the district court findings and conclusions —none of which is challenged by Montana. App. 26a-31a and 60a-62a.

Through the Act of May 19, 1958, 72 Stat. 121, Congress restored the previously ceded lands and minerals on the Crow ceded strip to tribal ownership and made them part of the reservation. Section 2 of the 1958 Act provides:

> Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, and *such lands are hereby added to and made part of the existing reservations* for such tribe or tribes [emphasis added] [72 Stat. 121].

The court below applied the plain meaning rule in concluding that the ceded strip lands and minerals were restored to reservation status by the 1958 Act. App. 7a.

The legislative history of the 1958 Act reflects that Congress was specifically informed that the ceded area was not then considered a part of the Crow Reservation. Accordingly, the language of Section 2 was added to insure that the land restored to Crow ownership would also be made a part of the Crow reservation.

The explanation for the language restoring the ceded lands both to tribal ownership and reservation status is contained in the reports of the Congressional Committees that considered the proposed legislation and recommended its enactment. Both the Senate and House Reports, S.Rep. 1508, 85th Cong., 2d Sess. (1958), App. 249a; H. Rep. 1336, 85th Cong., 2d Sess. (1958), include the letter reports of the Secretary of the Interior, dated June 25, 1957,

on the then pending bills. App. 251a-254a. The two Interior Department reports are identical. They recommend that the bills be enacted if amended as suggested by the Secretary.

With regard to the reservation provision, the letter reports from the Interior Department state (with emphasis added):

> We recommend that the bill be amended to conform to the draft bill enclosed with this report. With one exception (par. 5 below), the changes relate to matters of form and do not affect the substance of the bill. They are as follows: . . .
>
> 4. *The lands are made part of the existing reservation for the tribes.*
>
> 5. The tribes are authorized to sell or exchange the restored lands, with the approval of the Secretary of the Interior. *In the case of the Crow Tribe, the restored lands are outside the boundaries of the diminished reservation* and the tribe has indicated that it will probably want to negotiate sales or exchanges in order to make best use of the lands. The other tribes may encounter the same need.

S. Rep. 1508, *supra*, at 3, App. 253a-254a; H. Rep. 1336, *supra*, at 3. The Interior Department's proposed bill, which includes the language of the reservation provision as it was eventually enacted in Section 2 of the 1958 Act, is reproduced in S. Rep. 1508, *supra*, at 4, App. 254a-255a.

Had Congress intended merely to restore the ceded strip lands to tribal ownership, it could easily have done so without also restoring the lands to the existing reservation. Congress obviously intended to do both. The court of appeals' conclusion that the 1958 Act restored ceded

strip lands and minerals to reservation status is manifestly correct.

Montana does not seriously challenge the court of appeals' construction of the 1958 Act. Rather, Montana's claim is that the *surface* overlying the minerals which were restored to reservation status by the 1958 Act is outside the boundaries of the acknowledged reservation; that the state exercises general civil jurisdiction over the surface of the ceded strip; and therefore pre-emption standards for off reservation activities should apply.

But questions regarding jurisdiction over the surface of the ceded strip are not at issue in this case. Montana seeks to tax the severance of subsurface trust minerals which have been "added to and made a part of" the Crow reservation. While the history and status of the ceded strip is unusual, there is no ambiguity in the congressional action restoring the ceded strip lands and minerals to the Crow reservation. The court of appeals' application of the established pre-emption standards for reservation resources merely gave effect to the 1958 congressional action.

2. With respect to pre-emption the court of appeals correctly applied settled principles of federal Indian law. This Court articulated pre-emption standards governing the power of the States to tax and regulate activities on Indian reservations in *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982); and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In each of these cases the state tax or regula-

tion was held invalid because it impeded overriding federal objectives.

In *New Mexico v. Mescalero Apache Tribe, supra,* the Court extrapolated the governing principles:

> The exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with on-reservation activity . . . Thus a State seeking to impose a tax on a transaction between a tribe and non-members must ordinarily point to more than its general interest in raising revenues . . .

462 U.S. at 336. The court below applied these standards and held that Montana's coal taxes were not narrowly tailored to achieve legitimate state interests. App. 15a-17a.

In this case, Montana's interest in taxing coal owned by the Crow Tribe is primarily designed to raise revenue for general governmental purposes—only 8.75% of the tax revenue is spent for enviromental or coal-related services. App. 16a. A state's general interest in revenue raising is not sufficient to justify impeding federal interests. *Ramah Navajo School Board, supra,* at 843 and n.7; *White Mountain Apache Tribe v. Bracker, supra,* at 148-149. *Cf. Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 158 n. 26 (1982) (state tax on Indian minerals must be fairly related to state services).

Last term this Court in *California v. Cabazon Band of Mission Indians,* 107 S. Ct. 1083 (1987), reaffirmed the pre-emption principles articulated in *Bracker, Ramah,* and *Mescalero, supra,* and emphasized once again that

traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development "are important federal interests." 107 S.Ct. at 1092. Application of *Cabazon* is particularly appropriate where, as here, tribal trust resources have been developed under a federal statute intended "to insure that Indians received 'the greatest return from their property.' " *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767 n.5 (1985).

Nothing in the court of appeals decision suggests that a state may not impose a tax which is fairly related to state regulatory functions or services. See App. 13a. It bears some emphasis in this connection that neither the Crow Tribe nor the United States has challenged Montana's resource indemnity trust tax of .5 percent of the value of all minerals mined in the state. Proceeds from that tax are placed in a trust account to be used "to improve the total environment and rectify damage thereto." Mont. Code Ann. Secs. 15-38-104, 15-38-203. Unlike the severance and gross proceeds taxes, this tax appears reasonably related to legitimate state concerns.

Montana made no effort to show that its severance and gross proceeds taxes are narrowly tailored to effectuate any legitimate state interest. The evidence showed that ordinary state and local taxes, other than the coal taxes, yielded more than sufficient revenue to pay for the governmental costs associated with coal mining. App. 16a. For that reason, Montana's attempt to justify its severance and gross proceeds taxes was weak. The court of appeals concluded that Montana has charged "a heavy

tax for indeterminable future costs, imposing on the Tribe the burden of the doubt." App. 16a. On the record before it, the court of appeals was compelled by the prior decisions of this Court to strike down Montana's exorbitant taxes.

CONCLUSION

For the reasons explained above, this case does not present any previously undecided substantial federal questions. The circumstances of the Crow ceded area are unique to this case and present no issue warranting plenary review by this Court. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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October, 1987

FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 87-343

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OCTOBER TERM, 1987

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v.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO AFFIRM

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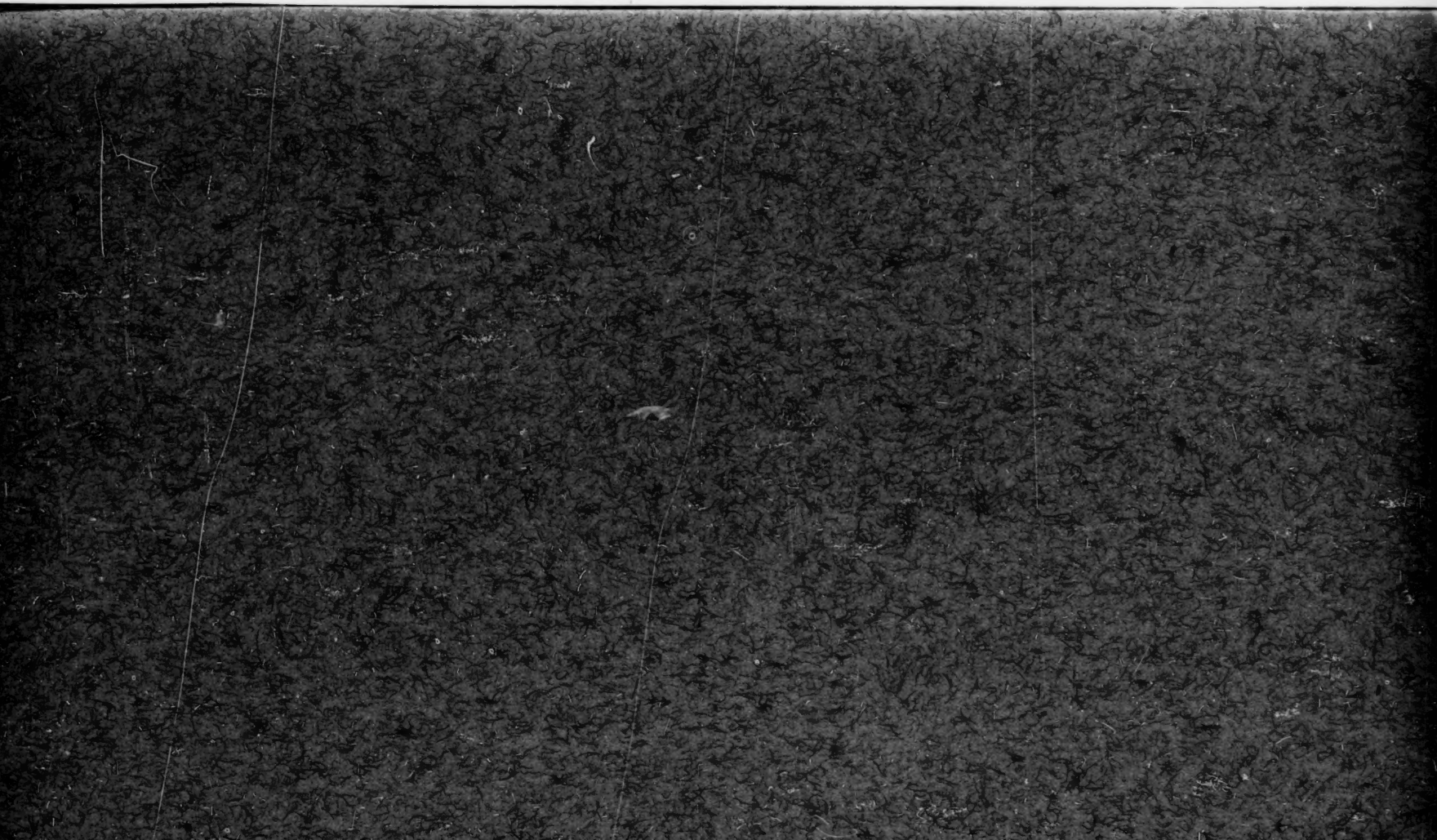

QUESTION PRESENTED

Whether Montana's gross proceeds and coal severance taxes may be applied, at the same rates that apply to the mining of coal owned by non-Indians, to the mining of coal that was part of the original Crow Reservation and that continues to be held by the United States in trust for the Crow Tribe of Indians.

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JURISDICTION

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tional statement was docketed on August 28, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

STATEMENT

1.a. This case concerns the application of the Montana severance and gross proceeds taxes to the mining of coal that is held by the United States in trust for the Crow Tribe of Indians. The Crow Reservation was formally established by the Second Treaty of Fort Laramie, May 7, 1868, 15 Stat. 649, which set apart the reserved lands "for the absolute and undisturbed use and occupation" of the Indians (art. II, 15 Stat. 650). See *Montana* v. *United States,* 450 U.S. 544, 547-548 (1981). In the Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352 (J.S. App. 136a-157a), Congress approved an agreement under which the Tribe ceded to the United States an area of approximately 1,137,500 acres, now called the "ceded strip."[1] The 1904 Act obligated the United States to continue to hold the land on the ceded strip in trust for the Tribe pending disposition to non-Indians under various public land laws, and it provided for the Tribe to receive the proceeds of that disposition as they were realized. Art. II, 33 Stat. 357 (J.S. App. 146a-147a); *Ash Sheep Co.* v. *United States,* 252 U.S. 159, 163-166 (1920). The various provisions of the 1904 Act were "all intended to secure to the Indians the fullest possible value for what are referred to in the agreement as 'their lands' and to make use of the proceeds for their benefit" (*Ash Sheep,* 252 U.S. at 165).

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[1] The Reservation previously had been reduced in size by several other statutes. Act of Apr. 11, 1882, ch. 74, 22 Stat. 42; Act of July 10, 1882, ch. 284, 22 Stat. 157; Indian Appropriations Act of Mar. 3, 1891, ch. 543, § 31, 26 Stat. 1039-1040. See *Montana*, 450 U.S. at 548.

On much of the ceded strip, both the surface and the underlying mineral estate were conveyed to entrymen under the homestead laws, to Montana for school lands, or to individual Indians as allotments. In the case of approximately 70,000 acres, however, when patents were issued to non-Indians, the coal deposits were reserved to the United States to be disposed of under the coal-land laws, with the proceeds paid to the Tribe. See J.S. App. 27a; Act of Feb. 27, 1917, ch. 133, §§ 1-4, 39 Stat. 944-945 (codified at 30 U.S.C. 86-89) (J.S. 158a-160a). Mineral rights likewise were reserved to the Tribe in connection with certain allotments to Indians. See Act of May 19, 1926, ch. 338, 44 Stat. 566 (J.S. App. 164a). Tribally owned coal also underlies the Reservation proper.[2]

b. In Section 3 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. 463, Congress authorized the Secretary of the Interior to restore to tribal ownership the remaining surplus lands of any Indian reservation that had been opened to entry prior to 1934. Immediately thereafter, the Secretary temporarily withdrew all remaining surplus lands, pending restoration to the tribes concerned. *Restoration of Lands Formerly Indian to Tribal Ownership*, 54 Interior Dec. 559 (1934). That withdrawal order applied to both surface lands and mineral rights (*id.* at 563), and it expressly included Crow Reservation lands that were opened under the 1904 Act (id. at 561). Ultimately, however, the surplus lands and reserved

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[2] Although allotments were made on the Reservation under the Crow Allotment Act of 1920, the mineral rights in allotted lands were reserved to the Tribe for 50 years. See Act of June 4, 1920, ch. 224, §§ 1 and 6, 41 Stat. 751, 753 (J.S. App. 161a-163a), as amended; Act of May 26, 1926, ch. 403, 44 Stat. 658 (J.S. App. 165a-168a), and Act of May 2, 1928, ch. 481, 45 Stat. 482 (J.S. App. 169a). In 1968, Congress permanently vested title to these mineral rights in the Tribe. Act of May 17, 1968, Pub. L. No. 90-308, 82 Stat. 123 (J.S. App. 183a). Compare *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649 (1976).

mineral rights on the ceded strip were not restored to full tribal ownership pursuant to Section 3 of IRA, because the Crow Tribe voted not to accept the provisions of the IRA. Accordingly, by Section 1 of the Act of May 19, 1958 (1958 Act), Pub. L. No. 85-420, 72 Stat. 121 (J.S. App. 176a), Congress separately restored surplus lands to the Crow Tribe and certain other non-IRA tribes. Approximately 10,000 acres of surface lands were restored to the Tribe by the 1958 Act. At that time, the United States also held approximately 150,000 acres of severed mineral rights in the ceded strip in trust for the Tribe, and the Department of the Interior has consistently interpreted the 1958 Act to have restored those rights to full tribal ownership as well. J.S. App. 29a-32a. Section 2 of the 1958 Act in turn provided that lands restored to tribal ownership "shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made a part of the existing reservations for such tribe or tribes." 72 Stat. 121 (J.S. App. 176a).

c. In 1972, Westmoreland Resources, Inc., a non-Indian company, entered into a lease with the Crow Tribe to mine the coal underlying approximately 15,000 acres of the ceded strip in Big Horn County, Montana.[3] That lease was entered into pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq.*, which, with certain exceptions not relevant here, governs the mineral leasing of *all* tribally owned lands (see *Montana* v. *Blackfeet Tribe,* 471 U.S. 759, 763 (1985)), both on and off-reservation. § 1, 25 U.S.C. 396a (J.S. App. 172a).[4]

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[3] Another lease entered into in the same year, covering an additional 16,000 acres, was cancelled in 1982 by the consent of the Tribe, Westmoreland, and the Secretary (J.S. App. 32a).

[4] The Crow Reservation, like several others, was originally excluded from the 1938 Act. § 6, 25 U.S.C. 396f (J.S. App. 174a). However, in 1959, the 1938 Act was made applicable to the leasing of reserved

Westmoreland has long-term contracts, extending through the year 1993, to supply coal from that tract to four midwestern utility companies. In 1980, the Shell Oil Company entered into an agreement to mine an area within the Crow Reservation. At the time of trial, however, Shell had not begun operations under the agreement because it could not find a purchaser for the coal, and Shell surrendered its rights under the agreement in 1985. J.S. App. 6a, 32a-33a.

2. In 1975, Montana enacted two taxes on coal production: a gross proceeds tax, levied at a rate equal to the county property tax (Mont. Code Ann. §§ 15-23-701 *et seq.* (1986) (J.S. App. 206a-207a)), and a severance tax, levied at a rate of between 3% and 30% of the contract price f.o.b. mine (Mont. Code Ann. §§ 15-35-101 *et seq.* (1986) (J.S. App. 208a-226a); see *Commonwealth Edison Co.* v. *Montana,* 453 U.S. 609, 613 (1981)).[5] The 30% severance tax rate for the coal at issue here was based on the Montana Legislature's finding that such coal—

> is in sufficient demand that at least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes * * *.

Mont. Code Ann. § 15-35-101(e) (J.S. App. 208a). The combined effective rate of Montana's severance and gross proceeds taxes is the highest in the United States. Cf. *Commonwealth Edison,* 453 U.S. at 640 (Blackmun, J., dissenting).[6]

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minerals underlying Reservation land that is subject to allotment. See Act of Sept. 16, 1959, Pub. L. No. 86-283, 73 Stat. 565 (J.S. App. 181a).

[5] Montana also imposes a resource indemnity trust tax of 0.5% of the value of all minerals mined in the State. The proceeds of that tax are placed in a trust account to be used "to improve the total environment and rectify damage thereto." Mont. Code Ann. §§ 15-38-104, 15-38-203. Neither the Tribe nor the United States has challenged application of that tax to the Tribe's coal.

[6] The combined effective rate (after allowed deductions) of these taxes on surface mining of the Crow Tribe's coal was estimated by the

The revenues from the severance tax are allocated by statute as follows: 50% is paid into a Permanent Trust Fund, the principal of which may be appropriated only by a three-fourths vote of the Legislature and the income from which may be appropriated annually for general state expenditures (Mont. Code Ann § 15-35-108(1) (J.S. App. 216a); Mont. Code Ann. § 17-6-203(5); see *Commonwealth Edison,* 453 U.S. at 613); other revenues are paid into the general fund and into special funds for public schools, conservation districts, water development projects, libraries, and acquisition of art works. Mont. Code Ann. § 15-35-108(3) (J.S. App. 217a-218a)). The severance tax statute also established three funds that were to be used for coal-related expenses: the coal area highway reconstruction fund, the coal impact fund, and the coal counties fund. However, those funds were initially allocated only 31% of the severance tax revenues, and, as of 1981, they received only 8.75% of those revenues. J.S. App. 16a. The gross proceeds tax is collected by the county and is used to meet general county and school district expenses (*id.* at 49a).

Tribe's expert witness to be 32.9% – more than twice that of Wyoming, the State with the next highest coal taxes. Montana, using a different method, calculated the rate at between 21% and 22%. J.S. App. 11a n.2.

In apparent recognition of the impact of the severance tax on coal production, the Montana Legislature in 1987 reduced the tax for coal of the quality at issue here to 25% for fiscal year 1990 and 20% for 1991 and subsequent years; and if statewide production exceeds 32.2 million tons (the average production for the years 1983-1986), the tax rate will be reduced to 25% from July 1, 1988, to June 30, 1990; to 20% from July 1, 1990, to June 30, 1991; and to 15% thereafter. 1987 Mont. Laws 1564, amending Mont. Code Ann. § 15-35-103 (J.S. App. 232a-235a). The 1987 amendments also provided for certain tax credits for new coal production (*id.*, amending Mont. Code Ann. § 15-35-202 (J.S. App. 237a-238a)). See J.S. 7-8 n.5. These amendments were not in effect when this case was decided.

Between 1975 and 1982, Westmoreland paid $53,800,000 in severance taxes and $8,100,000 in gross proceeds taxes as a result of its mining operations on the ceded strip. And since January 1983, Westmoreland has paid an additional $20,000,000 in taxes into the registry of the district court, pending the outcome of this case (J.S. App. 5a-6a). By contrast, through October 1983, Westmoreland had paid only $17,877,126 in royalties to the Tribe (*id.* at 56a). Moreover, the Tribe thus far has received no tax revenues from the mining of the coal. The Tribe did enact a 25% severance tax in 1976, and that tax was approved by the Secretary for application to mining on the Crow Reservation, such as that once planned by Shell. The Secretary disapproved application of the tribal tax to tribal coal mined from the ceded strip, because the Crow Tribe's Constitution disclaimed jurisdiction in that area. Nevertheless, in a 1982 amendment to its lease, approved by the Secretary, Westmoreland agreed to pay the tribal tax, subject to a credit for all state severance and gross proceeds taxes it was required to pay. Because of the higher taxes imposed by the State, this offset has prevented the Tribe from receiving any tax revenues. *Id.* at 6a, 53a-55a.

3.a. This suit was brought by the Crow Tribe in 1978 against the State of Montana, the Counties of Big Horn, Yellowstone, and Treasure, and various state and county officials. The Tribe sought declaratory and injunctive relief barring imposition of the Montana coal severance tax and gross proceeds tax on the production of tribally owned coal underlying the Reservation proper and the ceded strip. The district court dismissed the complaint for failure to state a claim. *Crow Tribe of Indians* v. *Montana,* 469 F. Supp. 154 (D. Mont. 1979).

b. In an opinion dated July 13, 1981 (J.S. App. 79a-106a), the court of appeals reversed and remanded for the district court to determine whether imposition of the

Montana taxes on the mining of the Tribe's coal impermissibly thwarts the goal of the Indian Mineral Leasing Act of 1938 to promote tribal self-government and economic development. The court found it significant that the background of the severance tax reflected two purposes that would conflict with the 1938 Act: to capture for the State a portion of the economic value of the coal and to regulate the manner in which coal is mined (J.S. App. 94a-97a). In the court's view, state taxes having such effects could be applied to the Tribe's coal only if Montana established that it had legitimate interests in taxing the coal and that the taxes were carefully tailored to effectuate those interests (*id.* at 97a-99a). The court of appeals also directed the district court to determine whether the taxes impermissibly interfere with tribal sovereignty, because they may affect the Tribe's ability to raise money for essential tribal services and because they are derived from "a component of the reservation land itself" (*id.* at 103a; see generally *id.* at 99a-104a).[7]

4. On remand, the district court once again sustained the Montana taxes as applied to the mining of the Tribe's coal in the ceded strip, although it declined to rule on the validity of the taxes as applied to on-Reservation coal because that coal was not being mined (J.S. App. 22a-74a).[8] The court first held that the Tribe retained a beneficial interest in the mineral interests in the ceded strip after the area was opened to settlement under the 1904 Act and that the 1958 Act restored those interests to full tribal ownership (J.S. App. 27a-32a, 60a-62a). But although Section 2 of the 1958 Act provides that lands

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[7] This Court denied the State's petition for a writ of certiorari to review the court of appeals' decision. 459 U.S. 916 (1982).

[8] In the proceedings on remand, the United States, which previously had appeared as amicus curiae, intervened as a plaintiff in support of the Tribe.

restored to tribal ownership are also made part of the existing reservation of the tribe concerned (see page 4, *supra*), the court concluded that the Tribe's mineral interests in the ceded strip were not restored to the Crow Reservation by the 1958 Act (J.S. App. 62a-63a).

The district court also recognized that there was no express congressional authorization for imposition of state taxes on the mining of the Tribe's coal, since this Court had held in *Montana* v. *Blackfeet Tribe*,471 U.S. 759 (1985), that the Indian Mineral Leasing Act of 1938 did not carry forward the taxing authorization that was contained in the Act of May 29, 1924, ch. 25 U.S.C. 398 (1924 Act). J.S. App. 63a. But the court nevertheless held that Montana's severance and gross proceeds taxes are valid because they do not conflict with the 1938 Act's purposes of revitalizing tribal governments and promoting economic development; in the court's view, the state taxes neither deprive the Tribe of control over its coal nor "significantly" affect the rate of coal development (*id.* at 66a-68a). The court further held that even if the taxes do hinder tribal economic development to some extent, that result was justified because the tax "perpetuate[s] the mineral wealth subject to [the State's] general civil jurisdiction" and provides for "such unquantifiable interests as the value of a trained workforce, an organized government and system of laws, as well as the unquantifiable burden of future socio-economic and environmental impacts resulting from coal mining" (*id.* at 67a-68a).[9]

5. A unananimous panel of the court of appeals reversed, holding that the Montana taxes, in their current form, cannot be applied to the mining of the Tribe's coal (J.S. App. 1a-21a). The court first held that the district

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[9] The court also held that the severance and gross proceeds taxes do not infringe on tribal sovereignty, because the Tribe does not exercise governmental power over the ceded strip or provide services there (J.S. App. 68a-71a).

court had erred in attaching virtually dispositive significance to its belief that the minerals underlying the ceded strip are technically outside the Reservation. The court explained that its holding on the prior appeal that the coal is a "component of the reservation land itself" (*id.* at 7a (quoting *id.* at 103a)) was the law of the case, and that in any event, Section 2 of the 1958 Act "restored to reservation status all lands returned to tribal ownership under [that] Act" (J.S. App. 7a).

The court of appeals next held that application of the severance and gross proceeds taxes to coal mined on the Reservation proper and on the ceded strip conflicts with the 1938 Act's purposes of promoting tribal self-government and economic development (J.S. App. 9a-17a). The court concluded that the high tax rates interfere with the Tribe's economic interests by reducing the coal's marketability[10] and by reducing the royalty the Tribe's lessees otherwise would be in a position to pay (*id.* at 11a-13a). This case therefore was found to be different from *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), where the Court held that the tribes were merely marketing an exemption from the state cigarette tax, because here the Tribe is marketing its own property and the lease generates value by virtue of tribal activities in which the Tribe has a substantial interest (J.S. App. 10a). In these respects, the court reasoned, the Tribe's coal-leasing enterprise is similar to the Indian-run bingo games that were held not to be subject to state regulation in *California* v. *Cabazon*

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[10] The court found that Montana had failed to rebut the evidence presented by the Tribe that in each year since the coal taxes were imposed, Montana's previously booming coal production had declined, while coal production in the adjoining State of Wyoming (where coal taxes are lower) continued to grow (J.S. App. 11a, 12a). In the court's view, this "[exact] correspond[ence]" showed at least some negative impact on the highly taxed coal's marketability (*id.* at 12a).

Band of Mission Indians, No. 85-1708 (Feb. 25, 1987). J.S. App. 10a, 15a.

The court of appeals also rejected Montana's contention that countervailing state interests justify the taxes' interference with the purpose of the 1938 Act (J.S. App. 13a-17a). The court noted that under the preemption analysis of *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136 (1980), and *Cabazon,* "the question is one of reviewing the state, federal, and tribal interests involved and whether, in this context, the state action is contrary to federal action" (J.S. App. 14a). Here, the court concluded that (i) Montana had failed to demonstrate legitimate state interests of a sufficient magnitude to overcome the strong presumption against the application of state taxes to activities that are essential to tribal self-government and economic development, and (ii) Montana's taxes are in any event not narrowly tailored to serve the State's asserted interests (J.S. App. 15a-17a). The record showed, for example, that although population growth attributable to increased mining between 1970 and 1982 had resulted in $38 million in governmental expenditures, state and local taxes (other than the coal taxes) had generated $42 million in additional revenues (*id.* at 15a-16a). And although the court recognized that there might be additional costs associated with the environmental consequences of coal mining, it found that "the state [had] failed to provide a specific figure" and instead proposed to "charge a heavy tax for indeterminable future costs, imposing on the Tribe the burden of the doubt" (*id.* at 16a). Moreover, many of the environmental impacts relied upon by the State were already addressed by federal and state regulation of mining activity under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, and air and water pollution laws (J.S. App. 16a). For these reasons, and because the majority of the revenues from Montana's severance taxes were dedicated to other purposes, the court of

appeals found only a "distant, rather than carefully tailored, relationship between severance tax revenues and the coal-related services" (*id.* at 16a-17a).[11]

ARGUMENT

The court of appeals correctly concluded that both Montana's 30% severance tax and its gross proceeds tax are preempted by the Indian Mineral Leasing Act of 1938 insofar as Montana seeks to apply those taxes to the mining of coal held in trust by the United States for the benefit of the Crow Tribe. Those state taxes directly interfere with one of the principal purposes of the 1938 Act: "to ensure that Indians receive 'the greatest return from their property.' " *Montana* v. *Blackfeet Tribe,* 471 U.S. 759, 767 n.5 (1985) (citations omitted). Moreover, under the balancing approach mandated by *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136 (1980), and *California* v. *Cabazon Band of Mission Indians,* No. 85-1708 (Feb. 25, 1987), Montana has wholly failed to carry its burden of showing that imposition of its extraordinarily high taxes on the mining of coal held by the United States in trust for the Tribe could be justified by state expenditures or other state interests that have a direct relation to the mining of the Tribe's coal or to other tribal activities or benefits.

Because Montana has sought to impose its severance and gross proceeds taxes in full force to the mining of tribally owned coal, without tailoring their application to take account of countervailing federal and tribal interests, those taxes necessarily are preempted. The court of

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[11] The court of appeals also held that the state taxes impermissibly infringe upon tribal sovereignty because the revenues now realized by the State for its general purposes could support essential tribal services and because the state taxes interfere with the Tribe's control over the development of its own resources (J.S. App. 17a-19a).

appeals' decision so holding rests on the application of settled principles and presents no issue of general importance warranting plenary review by this Court. The judgment of the court of appeals therefore should be affirmed. That course would not foreclose the Montana Legislature from tailoring its taxes in the future to correspond in some measure to legitimate state interests in this setting.

1.a. The coal owned by the Crow Tribe represents a principal component of the economic value of the Crow Reservation that was formally set aside for the Tribe in 1868 by the Second Treaty of Fort Laramie. That coal was expressly retained in reserved status for the benefit of the Tribe when the surface estate in the ceded-strip lands at issue here was allotted to Indians or patented to non-Indians as part of the opening of the ceded strip. Moreover, as Montana concedes (J.S. 10), the district court, based on a thorough review of the relevant materials, expressly held that the coal in the ceded strip—not merely the surplus surface land—was restored to full tribal ownership by Section 1 of the 1958 Act (J.S. App. 5a, 27a-32a, 60a-62a). The court of appeals affirmed that holding (*id.* at 5a), and the State does not appear to challenge it here (see J.S. 10, 17-18).

Thus, Montana seeks to impose its taxes on the extraction of minerals that are unquestionably the property of the Tribe and are held in trust by the United States for the benefit of the Tribe in the same manner as all other trust property. In *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981), which involved the same severance tax that is at issue here, the Court observed that "[i]n many respects, a severance tax is like a real property tax" (*id.* at 624). There can be little doubt that Montana is prohibited from imposing a real property tax on any lands, including coal deposits, that are held by the United States in trust for the Tribe, and the disclaimer clause in the Enabling Act by which Montana was admitted to the Union clearly bars

such a tax. Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 677. These circumstances alone suggest that application of Montana's taxes to the mining of the Crow Tribe's coal raises a grave potential for interference with important economic and other interests of the Tribe and the United States.

This conclusion is reinforced by the fact that the coal reserved for the Tribe is a depletable resource and the mining of that coal has the effect of diminishing the scope and value of the reservation itself. Thus, state taxes on the extraction of a depletable resource have the effect of diverting to the State a portion of the value of the reservation itself.[12] The Tribe has a vital interest in realizing the maximum return from the coal as it is extracted, so that the proceeds may be invested in a manner that will generate income or provide essential services for the Tribe and its members after the coal itself is gone. By contrast, Montana does not have a substantial interest in capturing a portion of the value of the Tribe's coal in order to devote that portion to *state* purposes.

2. Especially in light of the foregoing considerations, it is clear that application of Montana's current severance and gross proceeds taxes to the mining of the Tribe's coal is preempted by the Indian Mineral Leasing Act of 1938.

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[12] A comparable situation was presented in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), in which the Court held that the income an allottee realized from the sale of timber was not subject to federal taxation. The Court explained that the Indian's "timber constitutes the major value of his alloted land" and that "[o]nce logged off, the land is of little value." The Court therefore concluded that the allotment would not serve the congressional purposes of bringing the Indian to a state of competency and independence unless the entire proceeds of the sale of its timber were preserved for him. 351 U.S. at 10. See also *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. at 138 (cutting of timber on tribal land generated 90% of tribe's income for governmental programs).

The text and legislative history of the 1938 Act firmly establish that it does not leave room for state taxes of such magnitude.

a. Shortly before the 1938 Act was passed, this Court sustained the application of Montana's gross production and net proceeds taxes to a non-Indian company that produced oil and gas on lands leased from the Blackfeet Tribe. *British-American Oil Producing Co.* v. *Board of Equalization*, 299 U.S. 159 (1936). However, the Court there observed that it was "conceded that the State is without power to apply either [tax] to the production under this lease, save and except as Congress may have given its assent" (*id.* at 161). The Court accordingly sustained the tax only on the basis of the express assent of Congress contained in the Act of May 29, 1924, 25 U.S.C. 398, which provided that "the production of oil and gas and other minerals on such lands may be taxed by the State in which such lands are located in all respects the same as production on unrestricted lands * * *." 299 U.S. at 164-165, 166. When Congress enacted the 1938 Act less than two years later, it declined to include a similar authorization of state taxes. For this reason, the Court held in *Montana* v. *Blackfeet Tribe* that Montana may not impose its severance and net proceeds taxes on a Tribe's royalty income under oil and gas leases entered into pursuant to the 1938 Act.

b. Similar considerations require the conclusion that Montana's severance and gross proceeds taxes are presumptively invalid as applied to a non-Indian lessee under leases entered into pursuant to the 1938 Act.

First, as noted above, this Court made clear in *British-American* that at the time the 1938 Act was passed, the express authorization in the 1924 Act was required in order for Montana to impose its taxes on a non-Indian producer. Because Members of Congress, like other citizens, are assumed to know the law, Congress's deliberate

omission of a similar authorization of state taxes in the 1938 Act—even though it patterned the 1938 Act after the 1924 Act in other respects—strongly indicates that Congress did not intend to permit a State to tax the non-Indian producer. Cf. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 378-382 (1982). By contrast, on federally owned lands that are *not* held in trust for Indians, Congress has expressly consented to the imposition of state taxes on the output of mines and the property of the lessee. 30 U.S.C. 189. In *Commonwealth Edison*, this express authorization was critical to the Court's sustaining of Montana's coal severance tax as applied to mining of federally owned coal. 453 U.S. at 631-633.

Second, as the court of appeals held (J.S. App. 9a-13a), application of Montana's severance and gross proceeds taxes to the mining of the Crow Tribe's coal would be inconsistent with the purpose of the 1938 Act "to ensure that Indians receive 'the greatest return from their property' " (*Montana* v. *Blackfeet Tribe*, 471 U.S. at 767 n.5, quoting S. Rep. 985, 75th Cong., 1st Sess. 2 (1937), and H.R. Rep. 1872, 75th Cong., 3d Sess. 2 (1938)). If a lessee must pay state taxes on the production of minerals from Indian lands, the amount of revenues that the Tribe can receive necessarily is diminished. That effect is especially vivid in this case. The $80 million that the State has realized by application of the two taxes since 1975 far exceeds the royalties received by the Tribe under the lease, which totalled less than $18 million as of October 1983. Moreover, although the Tribe adopted its own 25% severance tax in 1976 and Westmoreland agreed in a 1982 amendment to its lease to pay the tribal tax, the Tribe thus far has been unable to realize any revenues from this arrangement. Under the lease amendment, Westmoreland must receive a credit for taxes paid to the State. See page 7, *supra*. Because the Montana taxes are imposed at a higher rate, the Montana taxes have had the direct effect

since 1982 of preventing the Crow Tribe from receiving an additional 25% of the value of its coal.[13]

Third, the state taxes also conflict with the policy of the 1938 Act to " 'bring all mineral-leasing matters in harmony with the Indian Reorganization Act' " (*Montana* v. *Blackfeet Tribe*, 471 U.S. at 767 n.5 (quoting S. Rep. 985,

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[13] The court of appeals also concluded that the high rate of the Montana taxes had at least some negative impact on the marketability of the Tribe's coal (J.S. App. 11a-13a). The court noted that in 1975, Montana accounted for 40.6% and Wyoming accounted for 43.8% of coal production in the Northern Great Plains; by 1982, Montana's share had dropped to 18.2% and Wyoming's share had risen to 69.5% (*id.* at 11a). The State contends (J.S. 12 n.8, 20-21) that the court of appeals improperly disregarded district court findings that the taxes did not affect the coal's marketability. However, the district court did not find that Montana's taxes had *no* effect on the marketing of the Tribe's coal; it expressly stated that the cumulative effect of those taxes is one factor that affects marketability, although it concluded that the tax rate, "at least at present," was overshadowed by other factors (J.S. App. at 56a). Nor did the court of appeals disregard the district court's findings; it correctly noted that "[t]he district court did not find the impact of taxes to be negligible" (*id.* at 12a).

Moreover, since the district court rendered its decision, Montana has essentially admitted that the severance tax has an impact on the marketability of coal, because the Legislature has established a system of tax credits to provide an incentive for the purchase of "new coal" and has reduced the tax rate at least to 20% by the year 1991. See note 6, *supra*. Similarly, when the severance tax was sustained against a Commerce Clause challenge, the Montana Supreme Court recognized that the tax might have an effect on marketability unless it was at least partially absorbed by producers, "because Montana does not have a monopoly in the production of coal" and "must compete in the market with coal produced in Wyoming, North Dakota, and other sources of supply" (*Commonwealth Edison Co.* v. *State*, 189 Mont. 191, 209, 615 P.2d 847, 856-857 (1980), aff'd, 453 U.S. 609 (1981)).

In any event, in view of the fact (discussed in the text) that the State's taxes have deprived the Tribe of an additional 25% of the value of the coal under *existing* contracts, the invalidity of the state taxes for present purposes does not depend on whether the taxes also have an impact on the ability of the Tribe to market its coal under future contracts.

supra, at 3, and H.R. Rep. 1872, *supra*, at 3)). The proviso to the 1924 Act that permitted state taxation of a lessee's income on production of minerals from unallotted lands was an integral part of the policy of allotting tribal lands to individual Indians and opening surplus lands to non-Indians. However, " '[t]he policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act' " (*Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479 (1976), quoting *Mattz* v. *Arnett*, 412 U.S. 481, 496 n.18 (1973)). In the Indian Reorganization Act (IRA), Congress prohibited any further allotment of reservation lands (§ 1, 25 U.S.C. 461), extended the trust period for existing allotments (§ 2, 25 U.S.C. 462), and provided for the restoration to the tribe of any remaining surplus lands (§ 3, 25 U.S.C. 463). The effect, of course, was to remove any expectation that unallotted and surplus tribal lands were destined to pass into non-Indian hands and state jurisdiction, and thereby to remove the justification for the state to tax mineral production on those lands in the same manner as lands that are subject to the State's jurisdiction. Montana's attempt to impose its taxes on the mining of coal that was restored to full tribal ownership in conformity with the IRA's repudiation of the allotment and surplus-land policies therefore conflicts with the 1938 Act's purpose of furthering the goals of the IRA.

Application of state taxes to leases under the 1938 Act also is inconsistent with the purpose of the IRA (and therefore of the 1938 Act) " 'to rehabilitate the Indian's economic life' " and " 'to give the Indians the control of their own affairs and of their own property.' " *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. 1804, 73d Cong., 2d Sess. 6 (1934), and 78 Cong. Rec. 11125 (1934) (remarks of Sen. Wheeler)). The income that the Tribe realizes from the mineral leasing of its lands, whether by royalty payments or taxes, is an

"essential instrument of self-government and territorial management" (*Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 139 (1982)). The ability of the Tribe to obtain those revenues could be seriously impeded if the State were permitted to siphon off a portion of the value of the Tribe's resources.

3. Although state taxes of the magnitude of those at issue here plainly conflict with the Indian Mineral Leasing Act of 1938, the court of appeals did not hold that the State is barred from imposing *any* tax on the mining of coal owned by the Crow Tribe. Rather, the court correctly concluded that the validity of state taxes must be determined by application of the principles applied by this Court in *White Mountain Apache Tribe* v. *Bracker, supra*, and *Cabazon*, which require a "particularized inquiry into the nature of the state, federal, and tribal interests at stake" (*Bracker*, 448 U.S. at 145). See also *Ramah Navajo School Bd.* v. *Bureau of Revenue*, 458 U.S. 832, 838-839 (1982). Under this approach, " '[s]tate jurisdiction is preempted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.' The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic devlopment." *Cabazon*, slip op. 13 (quoting *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334, 335, (1983)).

Here, as we have explained, the federal and tribal interests reflected in the 1938 Act and the IRA weigh heavily against imposition of Montana's severance and gross proceeds taxes. Indeed, this conclusion follows *a fortiori* from *White Mountain Apache Tribe* v. *Bracker, supra*. There, the Court held that the state's motor carrier license tax and fuel use tax could not be applied to a non-Indian contrac-

tor harvesting tribal timber. The amount of the state taxes assessed over a 4 ½-year period totalled $35,000, which was less than 1% of the White Mountain Apache Tribe's profits from timber harvesting (448 U.S. at 158-159 (Stevens J., dissenting)). Nevertheless, the Court held that even this minor diminution in the revenues received by the Tribe from the exploitation of its natural resources was prohibited, because it "threaten[ed] the overriding federal objective of guaranteeing Indians that they 'will receive * * * the benefit of whatever profit [the forest] is capable of yielding' " (*id.* at 149, quoting 25 C.F.R. 141.3(a)(3) (1979)) and the federal policy of promoting tribal economic development (see 448 U.S. at 143-144 & n.10, 149).[14] It follows that the Montana severance and gross proceeds taxes, imposed at an effective rate of 32.9% (see note 6, *supra*), likewise impermissibly interfere with the federal policy of promoting tribal economic development by ensuring that the Crow Indians receive " 'the greatest return from their property' " (*Montana* v. *Blackfeet Tribe*, 471 U.S. at 767 n.5 (citations omitted)).[15]

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[14] The Secretary's regulations at issue in *Bracker* involved the Bureau of Indian Affairs in all aspects of the contractual relationship between the tribes and the non-Indian timber harvesting companies (448 U.S. at 145-148), just as the leasing of Indian lands for mining purposes is subject to regulation by the Secretary (see 25 C.F.R. Pt. 211; cf. *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 373 (1968)).

[15] Montana attempts (J.S. 20, 23-24) to dismiss the relevance of the impact of the coal taxes on tribal revenues by analogizing the coal taxes to the state cigarette tax that was held to be applicable to on-reservation sales to non-Indians in *Colville*. However, *Colville* did not hold that a state tax's effect on tribal revenues is always irrelevant to preemption analysis. To the contrary, diminishment of tribal revenues as a result of state taxation is a key factor in preemption analysis where, as in *Bracker* and the instant case, Congress has chosen to regulate the tribal activity for the purpose of assuring that the Tribe receives the maximum revenues from that activity. See also *Cabazon*, slip op. 12-15. In *Colville*, by contrast, the Court found that Congress

This Court has indicated that under the balancing approach of *White Mountain Apache Tribe* v. *Bracker* and its progeny, the application of a state tax or other regulatory measure to non-Indians in matters affecting Indians might be justified by functions or services performed by the State in connection with those matters. *Cabazon*, slip op. 17-18; *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 336; *Ramah Navajo*, 458 U.S. at 843-845 & n.7; *Bracker*, 448 U.S. at 150. But in the area of taxes, the State "must point to more than its general interest in raising revenues" (*New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 336; accord, *Ramah Navajo*, 458 U.S. at 839, 845; *Bracker*, 448 U.S. at 150). That is essentially all the State has done in this case, however, because as this Court and the Montana Supreme Court both held when the Montana severance tax was sustained against a Commerce Clause challenge, the severance tax is " 'imposed for the general support of the [state] government,' " and therefore is a "general revenue tax" (*Commonwealth Edison*, 453 U.S. at 621 (quoting 615 P.2d at 856)). The only state expenditure uniquely associated with Westmoreland's mine that has been identified in the record in this case was the contribution of $500,000 to pay 25% of the cost of constructing a road used by employees and suppliers of the mine (the federal government paid the other 75% of the cost). See Exh. 42, at II-25 to II-26; 3 Tr. 417. The State therefore has wholly failed to carry its burden of identifying "specific, legitimate regulatory interests" (*Ramah Navajo*, 458 U.S. at 843) that justify collection of more than $80 million in state taxes on the extraction of the Tribe's coal.

For these reasons, the court of appeals was clearly correct in concluding that the state taxes are not "carefully tailored" to meet legitimate state interests in the extraction

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had not sought to regulate on-reservation cigarette sales to nonmembers and had manifested no intent that the tribe obtain revenues from such sales (447 U.S. at 155-156).

of the Tribe's depletable resource (J.S. App. 15a-17a). As the court of appeals found, that mining generates other taxes that meet much of the State's increased expenditures, and the State's concerns for the potential environmental effects of the mining are separately addressed by the Surface Mining Control and Reclamation Act and pollution laws (J.S. App. 16a). Moreover, coal-related purposes received only 8.75% of the severance tax revenues as of 1981 (*ibid.*), and, as noted above, there was no showing that a significant portion of even that limited share of severance tax revenues was expended on matters affecting either the Tribe or Westmoreland's mining. Indeed, the State has essentially conceded that the severance and gross proceeds taxes are not carefully tailored in the manner that this Court's decisions require, because the State acknowledges that they "are general revenue measures, not fees for services rendered," and that they "are designed to fund a broad range of present and future governmental activities," only some of which "hav[e] particular applicability to Westmoreland's mine" (J.S. 21 n.15).

4. Finally, the State seeks to avoid preemption of its severance and gross proceeds taxes as applied to Westmoreland's mining of the Tribe's coal by contending that the coal on the ceded strip is outside the boundaries of the Crow Reservation. In the State's view, such "off-reservation" taxes are automatically valid under *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), and should in any event be sustained under a more relaxed version of the balancing test applied in *Bracker* and *Cabazon*. This contention is without merit for several reasons.

a. Both courts below held—on the basis of the district court's exhaustive review of the background, legislative history, and consistent administrative interpretation of the 1958 Act—that the mineral interests in the ceded strip were restored to full tribal ownership by Section 1 of the 1958 Act (J.S. App. 5a, 27a-32a, 60a-62a). As the court of ap-

peals further held (*id.* at 7a), under Section 2 of the 1958 Act, all lands that were restored to tribal ownership by Section 1 were "made a part of the existing reservations for such tribe or tribes" (72 Stat. 121)—in this case, the Crow Reservation.[16] Contrary to the State's contention (J.S. 17 n.12), this interpretation of the 1958 Act is not contradicted by the language in the committee reports stating that in the case of the Crow Tribe, the restored lands were outside the boundaries of the diminished reservation. See S. Rep. 1508, 85th Cong., 2d Sess. 3 (1958); H.R. Rep. 1336, 85th Cong., 2d Sess. 3 (1958). Rather, those reports show that Congress, with full knowledge of the relevant circumstances, intended to apply to the Crow Tribe's land

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[16] The 1958 Act provided (72 Stat. 121 (J.S. App. 176a)):

> An Act [t]o provide for the restoration to tribal ownership of all vacant and undisposed-of ceded lands on certain Indian reservations, and for other purposes.
>
> * * * * *
>
> [§ 1.] All lands now or hereafter classified as vacant and undisposed-of ceded lands (including townsite lots) on the following named Indian reservations are hereby restored to tribal ownership, subject to valid existing rights:
>
> | Reservation and State | Approximate Acreage |
> |---|---|
> | * * * * * | |
> | Crow, Montana | 10,260.95 |
> | * * * * * | |
>
> Sec. 2. Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made a part of the existing reservations for such tribe or tribes.

The Act's reference to approximately 10,260 acres in connection with the Crow Reservation described only the surface estate, without limiting the operation of the Act to mineral interests underlying other surface lands that previously had been allotted or patented. See J.S. App. 61a-62a.

in the ceded strip the provision in Section 2 of the 1958 Act that made such lands "a part of the existing reservation[ ]."

The State also contends (J.S. 17) that the court of appeals' conclusion that the 1958 Act restored ceded-strip minerals to reservation status is inconsistent with its conclusion that the Act did not give the Tribe jurisdiction over the surface of the ceded area (see J.S. App. 7a n.1). However, neither the United States nor the Tribe has contended that the reservation status of the ceded-strip minerals operated to expand the exterior boundaries of the Crow Reservation on the surface or to confer civil or criminal jurisdiction on the Tribe as a general matter. The restoration of the minerals to reservation status is relevant in this case because it underscores that this valuable tribal asset continues to be held for the benefit of the Tribe and that the usual protection of a tribe's natural resources from state taxation applies equally to the Crow Tribe's coal underlying the ceded strip.

b. In any event, the court of appeals' interpretation of the 1958 Act in the unique circumstances of mineral rights underlying the ceded strip of the Crow Reservation presents no question warranting this Court's attention, since that interpretation is not essential to the judgment below. The court of appeals further held that the Indian Mineral Leasing Act of 1938 applies to tribally owned minerals "irrespective of the location of the tribal coal on or off the reservation" (J.S. App. 8a),[17] and application of the State's taxes to coal on the ceded strip therefore is preempted by the 1938 Act whether or not the coal is technically regarded as part of the Crow Reservation (see

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[17] The 1938 Act applies to mineral leasing both of "unallotted lands within any Indian reservation" and of other "lands owned by any tribe * * * of Indians under Federal jurisdiction" (§ 1, 25 U.S.C. 396a).

id. at 8a-17a). In fact, the conclusion that the 1938 Act has a preemptive force on tribal trust lands outside the boundaries of a reservation as well as within is required by a further purpose of the 1938 Act that was recognized by this Court in *Montana* v. *Blackfeet Tribe*: "to achieve 'uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes' " (471 U.S. at 767 n.5 (quoting S. Rep. 985, *supra,* at 2, and H.R. Rep. 1872, *supra,* at 1)). Similarly, the purpose of the 1938 Act of ensuring that Indians receive "the greatest return from their property" (see pages 16-17, *supra*) applies with equal force to reserved mineral rights that happen to lie outside the boundaries of the tribe's reservation for other purposes. That is especially so with respect to the Crow Tribe's mineral rights underlying the ceded strip, because those rights are part of the original Crow Reservation and because this Court long ago held that the 1904 Act was intended to secure for the Tribe the "fullest possible value" for the ceded-strip portion of its Reservation lands. (*Ash Sheep,* 252 U.S. at 165).

c. Contrary to the State's contention (J.S. 15-16, 23), the court of appeals' decision in this case is fully consistent with *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973), even if the court of appeals erred in holding that the Tribe's mineral interests in the ceded strip are part of the Crow Reservation. In *Jones,* the Court upheld the application of a state income tax to revenue generated by the tribe's operation of a ski lodge on leased land that was held by the United States in trust for the tribe. But the income being taxed was not, as here, directly tied to the depletion of the value of the trust land itself. In fact, although the Court sustained the state income tax as applied to revenues derived from the ski resort, it invalidated the state's compensating use tax as applied to materials used in the construction of ski lifts on the land. The Court held that permanent fixtures on the land are so intimately bound up with the use of the land itself that they too must be exempt from state taxation. 411 U.S. at 158-159. In this case, a tax

on the extraction of tribally owned minerals likewise is effectively a tax on the trust land itself. Thus, the decision in *Jones* did not purport to announce a per se rule approving all state taxation of off-reservation activities affecting tribal interests, and it certainly does not justify state taxation of the extraction of tribal mineral resources that were part of the Crow Tribe's original reservation and have continued at all times to be reserved for its benefit.[18]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 1987

[18] The State also contends (J.S. 24-25) that the court of appeals erred in invalidating the state taxes as applied to mining on the Crow Reservation proper (J.S. App. 19a-20a). Whether an issue is ripe for review turns on " 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.' " *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (quoting *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967)). Here, the court of appeals correctly concluded that the potential impact of the state taxes on the Tribe's ability to market its coal justified a determination regarding the application of the state taxes to on-reservation mining. Moreover, the legal issue was manifestly fit for judicial resolution: if, as we have shown, the court correctly concluded that the taxes are preempted as applied to mining on the ceded strip, it follows *a fortiori* that they are preempted within the boundaries of the Reservation.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1987—202-037/60111

(5)

Supreme Court, U.S.
FILED
DEC 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-343

In The
Supreme Court of the United States
October Term, 1987

STATE OF MONTANA; JOHN D. LaFAVER, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; TREASURE COUNTY, Montana; YELLOWSTONE COUNTY, Montana; LORRAINE HAMILTON, Treasurer, Big Horn County, Montana; KATHLEEN THOMAS, Treasurer, Treasure County, Montana; and MAY JENKINS, Treasurer, Yellowstone County, Montana,

Appellants,

vs.

CROW TRIBE OF INDIANS; UNITED STATES OF AMERICA; and WESTMORELAND RESOURCES, INC.,

Appellees.

ON APPEAL FROM THE NINTH CIRCUIT COURT OF APPEALS

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

Appellees Crow Tribe of Indians and United States have filed separate motions to affirm the court of appeals' judgment. Both motions obscure the critical fact that the Montana coal gross proceeds tax, Mont. Code Ann. §§ 15-23-701 to -704 (1987), and the Montana coal severance tax, Mont. Code Ann. §§ 15-31-101 to -205 (1987), are imposed not on the Tribe but on appellee Westmoreland Resources, Inc., a non-Indian producer, and that the taxes are calculated upon a value which is determined after ownership of the resource has passed from the Tribe to Westmoreland. The motions further ask the Court to credit a reading of the Act of May 19, 1958, 72 Stat. 121 (1958 Act), inconsistent with the express language of that statute and its legislative history. Finally, the United States' motion seeks to establish an extraordinarily broad range of federal preemption under the Indian Mineral Leasing Act of 1938, 52 Stat. 347 (*codified as amended in* 25 U.S.C. §§ 396a to 396g) (1938 Act), on the basis of isolated phrases from Senate Report No. 985, 75th Cong., 1st Sess. (1937). The motions to affirm thus underscore the substantial nature of the questions presented and the appropriateness of plenary consideration.

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ARGUMENT

1. The motions to affirm directly or indirectly characterize the challenged taxes as being imposed on the Tribe or its property.[1] Nonetheless, the court of appeals

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[1] The Tribe takes solace from the statement in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983), that "[t]he

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expressly held in *Crow Tribe v. Montana*, 650 F.2d 1101, 1110-11 (9th Cir. 1981), *amended*, 665 F.2d 1390, *cert. denied*, 459 U.S. 916 (1982) (J.S. App. 79a, 87a-90a), that the legal incidence of the state taxes falls on the producer, while the Montana Supreme Court has said that the act of severance effects a transfer of title to the coal from the mineral lessor to the lessee.[2] Instantly, that producer-lessee is Westmoreland which enjoys no statutory or common-law exemption from otherwise valid state taxation. *See, e.g., Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 150-55 (1973) (refusing to recognize tribal entity doing business off-reservation as federal instrumentality to whom United States' immunity against state taxation attached); *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 365 (1949) (overturning prior decisions which expansively applied intergovernmental immunity

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exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with on-reservation activity." (Crow Motion 10.) The United States argues that Montana "seeks to impose its taxes on the extraction of minerals that are unquestionably the property of the Tribe and are held in trust by the United States" and that "[t]here can be little doubt that Montana is prohibited from imposing a real property tax on any lands, including coal deposits, that are held by the United States in trust for the Tribe[.]" (U.S. Motion 13.)

[2] In *Commonwealth Edison Co. v. Montana*, 189 Mont. 191, 211, 615 P.2d 847, 858 (1980), *aff'd*, 453 U.S. 609 (1981), the court rejected a contention that, by taxing coal derived from federal leases, the State effectively taxed the nation as a whole, commenting that, "[o]nce mined under a federal lease or permit, title to the coal is vested as personal property in the lessee or permittee as soon as it is mined and removed from its original place" and that "[t]he coal being taxed here . . . is not 'our' coal, but the personal property of the [lessee] who produced it under lease or permit."

doctrine to private persons and holding state gross production and excise taxes valid with respect to oil and gas production pursuant to lease under 1938 Act).

Not only does the legal incidence of the Montana taxes fall on Westmoreland as the lessee-producer, but the amount actually taxed is determined on the basis of the post-severance "contract sales price," i.e., the FOB mine price minus various statutory deductions. Mont. Code Ann. §§ 15-23-701(d), 15-35-102(5), 15-35-103. The FOB mine price derives from a variety of factors, including the cost of labor, operational productivity, the producer's desired rate of return, state and federal taxes, and royalty obligations. (Trial Ex. D-301 at Ex. V-2.) However, because the contract sales price excludes production taxes passed through by the producer to a buyer[3] and a portion of royalties paid to Montana, the United States or a federally recognized Indian tribe (Mont. Code Ann. § 15-35-102(5)), those elements constituting the taxable valuation are substantially controlled by the producer's entrepreneurial acumen in extracting and marketing the coal. The gross proceeds and severance taxes are accordingly based upon an economic value which is determined following transfer of ownership to Westmoreland and is devoid of contribution from tribal facilities or management. *Cf. California v. Cabazon Band of Mission*

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[3] Mont. Code Ann. § 15-35-102(13) defines "taxes paid on production" to include "any tax paid to the federal, state, or local governments upon the quantity of coal produced as a function of either the volume or the value of production and does not include any tax upon the value of mining equipment, machinery, or buildings and lands, any tax upon a person s net income derived in whole or in part from the sale of coal, or any license fee." (J.S. App. 212a.)

Indians, 107 S. Ct. 1083, 1093-94 (1987) (tribes provided modern facilities for gaming establishments operated on reservation). The very method by which taxable value is calculated directly militates against the Tribe and United States' effort to portray the taxes as being imposed on trust property.

2. Both motions to affirm contend that the 1958 Act applies to mineral interests reserved by the United States when ceded-strip surface estates were conveyed. (Crow Motion 7; U.S. Motion 4, 13.) They also state that Montana does not "seriously challenge" (Crow Motion 9) or "appear to challenge" (U.S. Motion 13) this conclusion. Quite obviously, though, Montana has attacked that construction of the 1958 Act, terming it "radically skewed" (J.S. 17) because the Act facially refers to vacant and undisposed-of surface lands and the associated legislative history is silent as to restoration of mineral interests. *See* S. Rep. No. 1508, 85th Cong., 2d Sess. (1958) (J.S. App. 249a-256a). Had Congress intended to restore mineral interests under surface lands unaffected by the statute, it would presumably have said so.[4]

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[4] In the face of congressional silence, the United States argues that the 1958 Act was intended to extend to tribes which had not accepted the provisions of the Indian Reorganization Act of 1934, 48 Stat. 984 (*codified in* 25 U.S.C. §§ 461 to 479), the benefits accorded under the IRA. (U.S. Motion 3-4.) Equality, however, did not require such extension here since, under the Court's reasoning in *Ash Sheep Co. v. United States*, 252 U.S. 159, 166 (1920), the Tribe retained a beneficial ownership interest in all ceded-strip reserved minerals and that interest was already protected under the 1938 Act. In the latter regard,

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Yet, even were the Tribe and United States' premise concerning the effect of the 1958 Act on reserved mineral interests underlying nonrestored surface lands valid, analytical difficulties abound. The United States, for example, admits in its motion that the 1958 Act did not "expand the exterior boundaries of the Crow Reservation on the surface or . . . confer civil or criminal jurisdiction on the Tribe as a general matter." (U.S. Motion 24.) If, however, the Crow Reservation's exterior boundaries were not modified with respect to surface lands by the Act, there can be no logical claim that those boundaries were somehow extended subsurfacely. Perhaps recognizing the inherent contradiction in its position, the United States suggests that it is unimportant whether Westmoreland's mining activities occur on "reservation" lands since, under any circumstances, the 1938 Act applies. (*Id.* at 23.) Nonetheless, *Mescalero Apache Tribe v. Jones, supra,* unquestionably has continuing vitality (*New Mexico v. Mescalero Apache Tribe,* 462 U.S. at 335 n.18), and the locus of the regulated activity thus has particular significance here because, when outside a reservation's exterior boundaries, no exemption from state taxation

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it should be noted that the exclusion of the "Crow Reservation" in section 6 of the 1938 Act, 25 U.S.C. § 369f, did not apply to reserved mineral interests under the ceded strip because they were not part of the Reservation; a contrary conclusion, moreover, would preclude application of the 1938 Act to the ceded-strip interests presently at issue since they do not underlie lands available for allotment pursuant to the Act of June 4, 1920, 44 Stat. 751, 753 (J.S. App. 161a, 162a-163a), as amended, and were therefore unaffected by the Act of September 16, 1959, 73 Stat. 565 (J.S. App. 181a), extending coverage of the 1938 Act to such lands.

can be conferred upon tribal entities without an express congressional mandate. *Jones* compels at least as stringent a rule with respect to non-Indian mineral lessees.[5] There is, of course, no express exemption from state taxation in either the 1958 Act or any other federal statute presently applicable, and the United States thus effectively requests the Court to adopt an analysis at odds with the dichotomy drawn in *Jones*.[6]

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[5] The United States relies on *British-American Oil Producing Co. v. Board of Equalization*, 299 U.S. 159 (1936), for the proposition that *any* taxation of a non-Indian mineral lessee requires explicit congressional consent. (U.S. Motion 15-16.) This argument is premised on the Court's statement that "[t]he taxes in question are a gross production tax and a net proceeds tax, and it is conceded that the State is without power to apply either to the production under this lease, save and except as Congress may have given its assent." *Id.* at 161. Nevertheless, not only did *British-American* involve production within the exterior boundaries of the Blackfeet Reservation, but the concession conclusorily referred to can hardly be metamorphosed into a holding. Moreover, were the importance attached to this aspect of the decision by the United States accepted, an obvious conflict would arise with respect to the later-decided *Oklahoma Tax Comm'n v. Texas Co., supra*, which rejected the federal instrumentality doctrine upon which the concession was apparently based. *See British-American Oil Producing Co. v. State Board of Equalization*, 101 Mont. 293, 296, 54 P.2d 129, 130, *aff'd*, 299 U.S. 159 (1936).

[6] The United States contends *Jones* is consistent with its position because that decision struck down a state compensating use tax on materials used to construct ski lifts on trust land and because "a tax on the extraction of tribally owned minerals likewise is effectively a tax on the trust land itself." (U.S. Motion 25-26.) This contention ignores the fact that the Montana taxes are imposed not on "the trust land itself" but on an economic value determined after severance and transfer of ownership from the mineral lessor to the lessee and that, in *Jones*, an explicit exemption from state and local taxation existed under 25 U.S.C. § 465 for the lands to which the ski lifts were deemed fixtures—an exemption unavailable to the Tribe since the mineral interests at issue were not acquired under the IRA.

3. The United States' motion to affirm discusses at length the 1938 Act's preemptive scope and argues, in essence, that any state taxation of non-Indian producers like Westmoreland is foreclosed, irrespective of whether on- or off-reservation, unless the tax revenues bear a direct relationship to the cost of governmental services provided the producer in connection with the taxed activity. (U.S. Motion 14-22.) Its argument is predicated principally on the notion that the 1938 Act is intended "to ensure that Indians receive 'the greatest return from their property[.]' " (*Id.* at 16.)[7]

To the extent the United States' position is urged as to mining activity concededly outside the exterior boundaries of the Crow Reservation, it squarely conflicts with *Jones* for those reasons stated above. Furthermore, even if *Jones* is placed aside, its position glosses over the admitted fact that, unlike *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), or later cases, the ceded

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[7] The United States additionally argues that the Montana taxes "conflict with the policy of the 1938 Act to 'bring all mineral-leasing matters in harmony with the Indian Reorganization Act' " because they run counter to the IRA's "repudiation of the allotment and surplus-land policies" previously in effect (U.S. Motion 17-18.) The reference in Senate Report No. 985, 75th Cong., 1st Sess. (1937), to bringing all "mineral-leasing matters in harmony with the Indian Reorganization Act" was, however, clearly directed to giving tribes control over the leasing of their mineral resources, which did not then exist under all federal statutes but which was provided under the IRA. Moreover, not only is the 1938 Act silent on the question of state taxation, but the IRA also does not address the authority of states to tax non-Indians. The United States' more general contention that the taxes offend the IRA's purpose of facilitating tribal economic development (U.S. Motion 18-19) has been rejected in *Jones*, 411 U.S. at 150-53, and *Washington v. Confederated Tribes of Colville Ind. Res.*, 447 U.S. 134, 155 (1980).

strip is governmentally administered by Montana and various state political subdivisions. The very underpinning of *White Mountain*—state taxation of activities as to which Arizona had little or no responsibility—is thus absent here. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 162 (upholding state's authority to seize tribally-owned unstamped cigarettes and finding significant "that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries"). It is instead the Tribe which has no governmental responsibility but which seeks to exclude Montana from imposing taxes uniformly required of producers like Westmoreland.[8] To

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[8] As the district court stated, the Tribe's severance tax code was not approved by the Secretary of the Interior for application to the ceded strip "because the Tribe lacks the power under its constitution to levy a tax off its reservation and because the Secretary has not determined whether such power exists as a matter of federal law." (J.S. App. 53a.) The absence of such authority parallels the Tribe's lack of governmental responsibility for the ceded strip and distinguishes this matter from the *White Mountain* paradigm where a state attempts to assert its taxing or regulatory power in a geographical area and over a relationship largely outside its control as sovereign. It must be emphasized that the 1982 lease amendment providing for the payment of a "tax" by Westmoreland to the Tribe under certain conditions is not contrary to the latter's lack of tax authority on the ceded strip. The amendment provided that Westmoreland would pay to the Tribe "a tax equal to the Montana State Coal Severance Tax . . . applicable to the mining of coal generally within the state . . . and a tax equal to the Montana State Gross Proceeds Tax . . . applicable to the mining of coal generally within the state . . . less whatever amount is required to be paid in severance and gross proceeds taxes to the State of Montana or its political subdivisions." (Trial Ex. P-81 at 1-2.) Despite use of the term "tax," the agreement also stated that

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construe an isolated phrase in the Acting Secretary of the Interior's letter reproduced in Senate Report 985 as mandating adoption of the preemption standard espoused by the court of appeals, Tribe and United States does noting more than judicially legislate. Unquestionably, the issue of whether *White Mountain* interest-balancing standards apply here and, if so, how they should be applied demands a far more careful analysis than that suggested below or by the Tribe and United States.[9]

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the amendment "will not be construed in any way as an admission by Lessee that Lessor has any power to impose any tax on Lessee without Lessee's consent." (*Id.* at 3.) The "tax" is thus a consensual arrangement and not the Tribe's unilateral exercise of sovereign authority. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982) ("[w]hatever place consent may have in contractual matters and in the creation of democratic governments, it has little if any role in measuring the validity of an exercise of legitimate sovereign authority").

[9] The facile nature of their analysis, wholly accepted by the court of appeals, is reflected in its two major tenets. First, the notion that a *quid pro quo* relationship must exist between tax revenues received and services rendered distorts *White Mountain*, which did not limit the scope of legitimate state interests to simply recouping identifiable expenditures. *White Mountain* instead requires substantially greater attention and weight be given to the involved governmental realities. Second, the Tribe and United States' implicit assertion that courts are equipped to make difficult policy decisions with respect to appropriate taxation levels—especially when, as the district court found (J.S. App. 43a-45a, 52a-53a), many future governance costs are unquantifiable, is highly questionable. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 629 (1981) ("it is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxation, and yet be reasonably capable of application in a wide variety of individual cases").

CONCLUSION

The appellants respectfully request that the motions to affirm be denied, that probable jurisdiction be noted, and that plenary briefing and argument on the merits be ordered.

Respectfully submitted,

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December 1987